39

No. 94-1039-CSX
Status: GRANTED

Title: Roy Romer, Governor of Colorado, et al., Petitioners
v.
Richard G. Evans, et al.

Docketed:
December 12, 1994

Court: Supreme Court of Colorado

Counsel for petitioner: Norton,Gale A.

Counsel for respondent: Dubofsky,Jean E., Wadsworth,Clyde J., Eurich,Gregory A., Winer,Jeanne, Goldberg,Suzanne B., Miller,David H., Ebert,Darlene M., Coles,Matthew A., Caswall,Edward M.

NOTE: Ptr objects to any ext to file brf in opp, see letter dated 12-9-94, in corr. folder.

Entry	Date	Note	Proceedings and Orders
1	Dec 12 1994	G	Petition for writ of certiorari filed.
3	Dec 21 1994		Order extending time to file response to petition until January 25, 1995.
4	Jan 10 1995		Brief of respondents City of Aspen, et al. in opposition filed.
6	Jan 24 1995		Brief amici curiae of Alabama, et al. filed.
5	Jan 25 1995		Brief of respondents Richard G. Evans, et al. in opposition filed.
8	Jan 25 1995	G	Motion of Family Defense Council for leave to file a brief as amicus curiae filed.
9	Jan 25 1995	G	Motion of Colorado for Family Values for leave to file a brief as amicus curiae filed.
10	Feb 1 1995		DISTRIBUTED. February 17, 1995 (Page 43)
11	Feb 1 1995	X	Reply brief of petitioners filed.
12	Feb 21 1995		Motion of Family Defense Council for leave to file a brief as amicus curiae GRANTED.
13	Feb 21 1995		Motion of Colorado for Family Values for leave to file a brief as amicus curiae GRANTED.
14	Feb 21 1995		Petition GRANTED.
			**********
17	Mar 31 1995		Order extending time to file brief of petitioner on the merits until April 21, 1995.
24	Mar 31 1995		DEFERRED APPENDIX METHOD.
18	Apr 5 1995		Brief amicus curiae of Family Research Council filed.
23	Apr 20 1995		Brief amicus curiae of Pacific Legal Foundation filed.
26	Apr 20 1995		Brief amicus curiae of American Center for Law & Justice Family Life Project filed.
19	Apr 21 1995		Brief amicus curiae of Equal Rights, Not Special Rights, Inc. filed.
20	Apr 21 1995		Brief amici curiae of Alabama, et al. filed.
21	Apr 21 1995		Brief amicus curiae of Colorado For Family Values filed.
22	Apr 21 1995		Brief amici curiae of Christian Legal Society, et al. filed.
25	Apr 21 1995		Brief of petitioners Roy Romer, Governor of Colorado, et al. filed.
27	Apr 21 1995		Brief amicus curiae of Concerned Women for America,Inc. filed.
30	Apr 21 1995		Brief amici curiae of Oregon Citizens Alliance, et al.

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Entry	Date	Note	Proceedings and Orders
			filed.
31	Apr 21 1995		LODGING consisting of ten copies of newspaper articles submitted by counsel for amici Oregon Citizens Alliance,et al.
29	May 9 1995		Order extending time to file brief of respondent on the merits until June 12, 1995.
33	May 26 1995		Brief amicus curiae of National Bar Association filed.
34	Jun 7 1995		Order further extending time to file brief of respondent on the merits until June 19, 1995.
35	Jun 9 1995		Brief amici curiae of Laurence H. Tribe, et al. filed.
41	Jun 16 1995		Brief amicus curiae of American Bar Association filed.
43	Jun 16 1995		Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed.
36	Jun 19 1995		Brief amici curiae of NAACP Legal Defense Fund, Inc., et al. filed.
37	Jun 19 1995		Brief amici curiae of Human Rights Campaign Fund, et al. filed.
38	Jun 19 1995		Brief amici curiae of American Association on Mental Retardation, et al. filed.
39	Jun 19 1995		Brief amici curiae of Affirmation: United Methodists for Gay Concerns, et al. filed.
40	Jun 19 1995		Brief amicus curiae of American Federation of State, County and Municipal Employees filed.
42	Jun 19 1995		Brief amici curiae of National Education Association, et al. filed.
44	Jun 19 1995		Brief amici curiae of Colorado Bar Association, et al. filed.
45	Jun 19 1995		Brief amici curiae of Oregon, et al. filed.
46	Jun 19 1995		Brief amici curiae of American Friends Service Committee, et al. filed.
47	Jun 19 1995		Brief amicus curiae of James E. Andrews filed.
48	Jun 19 1995		Brief amici curiae of Atlanta, et al. filed.
49	Jun 19 1995		Brief amici curiae of American Psychological Association, et al. filed.
50	Jun 19 1995		Brief of respondents City of Aspen, et al. filed.
51	Jun 19 1995		Brief of respondents Richard G. Evans, et al. filed.
52	Jun 19 1995		Brief amicus curiae of Gay and Lesbian Lawyers of Philadelphia filed.
55	Jul 3 1995		Joint appendix filed.
56	Jul 3 1995		LODGING consisting of Defendants' exhibit W (CFV Brochure) received from counsel
53	Jul 7 1995	G	Application (A95-23) to extend the time to file a reply brief from July 19, 1995 to August 4, 1995 by petitioners, submitted to Justice Breyer.
54	Jul 10 1995		Application (A95-23) granted by Justice Breyer extending the time to file until August 4, 1995.
57	Jul 28 1995		CIRCULATED.
58	Aug 1 1995		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1995. (1ST CASE).
59	Aug 4 1995	X	Reply brief of petitioners filed.
60	Aug 8 1995		Record filed.
		*	Partial record proceedings Supreme Court of Colorado.

No. 94-1039-CSX

Entry	Date	Note	Proceedings and Orders
61	Oct 10 1995		ARGUED.
62	Oct 12 1995		Record filed.
		*	Original record proceedings District Court for the City and County of Denver (4 BOXES)

Supreme Court, U.S.
FILED

(1) 941039 DEC 12 1994

No. 94 -
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

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196 pp

QUESTION PRESENTED

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT*, AND WILL REVOLUTIONIZE EQUAL PROTECTION JURISPRUDENCE 8

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS 14

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE TO THE RIGHT OF SELF-GOVERNMENT 16

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **PAGE**

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) 11

Beal v. Doe, 432 U.S. 438 (1977) 18

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 15

Board of County Comm'rs v. City & County of Denver, 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed*, 372 U.S. 679 (1963) 18

Bowers v. Hardwick, 478 U.S. 186 (1986) 16

Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. App. 4th Dist. 1991) 11

City of Glendale v. Buchanan, 195 Colo. 267, 578 P.2d 221 (1978) 18

Davis v. Bandemer, 478 U.S. 109 (1986) 17

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F. Supp. 1235 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) 19

Gordon v. Lance, 403 U.S. 1 (1971) 7, 12

Gregory v. Ashcroft, 501 U.S. 452 (1991) 18

CASES	PAGE
Harris v. McCrae, 448 U.S. 297 (1980)	18
High Tech Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990)	15
Hill v. Stone, 421 U.S. 289 (1975)	12
Hunter v. Erickson, 393 U.S. 385 (1969)	7-9, 11, 12, 14
Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	7, 13
James v. Valtierra, 402 U.S. 137 (1971)	8-11, 14, 22
Karcher v. Daggett, 462 U.S. 725 (1983)	17
Kramer v. Union Free School Dist., 395 U.S. 621 (1969)	7, 12
Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971)	11
Maher v. Roe, 432 U.S. 464 (1977)	18
Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890 (2d Cir. 1980)	13
National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1988), *aff'd*, 470 U.S. 903 (1985)	15

CASES	PAGE
Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)	15
Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), *cert denied*, 113 S. Ct. 655 (1992)	15
Reynolds v. Sims, 377 U.S 533 (1964)	7, 12, 13
Richardson v. Ramirez, 418 U.S. 24 (1974)	16
Romer v. Evans, 114 S. Ct. 419 (1993)	3, 20, 22
Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979)	14
Steffan v. Perry, No. 91-5409 (D.C. Cir. Nov. 22, 1994)	15, 16
Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)	11
Washington v. Seattle School Dist. No.1, 458 U.S. 457 (1982)	8, 10-12, 14, 19
Williams v. Rhodes, 393 U.S. 23 (1968)	7, 13
Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)	15, 16

CONSTITUTIONAL PROVISIONS **PAGE**

U.S. Const. art. VI 17

U.S. Const. amend. X 19

U.S. Const. amend XIV, § 1 . . . . . 2, 3, 7-9, 12, 14, 15, 17

Colo. Const. art. II, § 30b 2, 3

Colo. Const. art. IV, § 1 18

Colo. Const. art. V, § 3 18

Colo. Const. art. V, § 50 17

Colo. Const. art. XIV, § 3 18

Colo. Const. art. XVIII, § 9 18

Colo. Const. art. XVIII, § 9a 18

Colo. Const. art. XX, § 1 18

Colo. Const. art. XX, § 7 18

STATUTES **PAGE**

28 U.S.C. § 1257 2

42 U.S.C. § 1983 3

Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363) 21

Cal. Civ. Code § 51.7 (West 1982) 21

Cal. Labor Code § 1102.1 (West 1989) 21

Conn. Gen. Stat. Ann. § 46a-81a to 46a-81r (West 1986) 21

D.C. Code Ann. § 1-2502, 1-2503 (1991) 21

Haw. Rev. Stat. § 378-1, 378-3 (1992 Supp.) 21

Mass. Gen. L. ch. 1518 § 3, 4 (1982) 21

N.J. Stat. Ann. § 10:5-5, 10:5-12 (West 1993) 21

Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, § 4503-4504 (1984), tit. 21, § 495 (1987) 21

Wis. Stat. Ann. § 101.22, 111.32 (West 1988) 21

RULES

Colo. R. Civ. Pro. 4

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE**

Amendment 2: Gay Rights Gain New Momentum, Denver Post, Oct. 12, 1994 20

Anti-Gay-Rights Drive Spreads, Denver Post, Mar. 5, 1993. 20

Council of State Governments, *The Book of the States* (1990) 18

Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) 5

Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397 (1985) 12

Oregon Lawmakers Ban Local Votes on Gay Bias, New York Times, July 30, 1993 21

R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. of Law, Ethics & Pub. Pol'y ___ (1994) 20, 22

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

The Governor of the State of Colorado, and the State of Colorado petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The opinions of the Colorado Supreme Court (Pet. App. B and D) are reported at ___ P.2d ___ (Colo. 1994) and 854 P.2d 1270 (Colo. 1993), respectively. The opinions of the trial court (Pet. App. C and E) are not reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Colorado Supreme Court was issued on October 11, 1994, and modified on November 7, 1994. The mandate of the Colorado Supreme Court (Pet. App. A) was entered on November 14, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

A. Course of Proceedings

This case involves the validity of a state constitutional amendment prohibiting state and local governmental entities from enacting, adopting or enforcing any law or policy providing special legal protections for homosexuals and bisexuals. This provision, popularly known in Colorado as "Amendment 2,"[1] was passed at the general election held November 3, 1992. On November 12, 1992, the Respondents instituted an action in state district court under 42 U.S.C. § 1983, claiming that Amendment 2 facially violated several provisions of the federal constitution. Upon motions filed by the Respondents, the trial court on January 15, 1993 preliminarily enjoined the Petitioners from enforcing Amendment 2.

On July 19, 1993, the Colorado Supreme Court affirmed the issuance of the preliminary injunction. *Evans v. Romer*, 93SA17, *reported at* 854 P.2d 1270, 1286 (Colo. 1993) ("*Evans I*") (Pet. App. D). The Colorado Supreme Court held that Amendment 2 presumptively violated "an independently identifiable group's" "right to participate equally in the political process," protected by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, the court below remanded the matter for a trial on whether the provision was narrowly tailored to achieve a compelling governmental interest.[2]

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[1]The Colorado Revisor of Statutes renumbered this provision as art. II, § 30b for "ease of location." Colo. Rev. Stat., Vol. 1A (1994 Supp.).

[2]The Petitioners sought certiorari after the Colorado Supreme Court's initial decision. No. 93-453 (U.S. S. Ct. filed Sept. 17, 1993). The Respondents then argued that the matter was not final, and this Court denied review on November 1, 1993. *Romer v. Evans*, 114 S. Ct. 419 (1993). There is no question that the judgment of the Colorado Supreme Court is now final.

Trial was held on October 12-22, 1993. At trial, the Petitioners presented evidence and argument concerning several compelling state interests supporting Amendment 2.[3] On December 14, 1993, the trial court ruled that although Amendment 2 promoted two compelling interests -- religious freedom and familial privacy -- it was nonetheless infirm because it was not narrowly drawn to achieve those purposes in the least restrictive manner possible. Pet. App. C-14.[4]

The Colorado Supreme Court reaffirmed its holding that Amendment 2 is subject to strict scrutiny review, and affirmed the trial court's determination that Amendment 2 violated the federal constitution. *Evans v. Romer*, 94SA48 and 94SA128, (Colo. Oct. 11, 1994) ("*Evans II*") (Pet. App. B). Accordingly, it entered final judgment permanently enjoining the enforcement of Amendment 2.

B. Statement of Facts

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted or were actively considering granting special legal protections to homosexuals and bisexuals: three cities (Denver, Boulder, and Aspen) had enacted ordinances prohibiting discrimination based on sexual orientation in

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[3]These interests included (1) deterrence of factionalism through preempting local laws; (2) preventing governmental interference with personal, familial, and religious privacy; (3) preserving the integrity of the State's political functions; (4) preserving the ability of the State to remedy discrimination against suspect classes; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) preserving individual autonomy on issues of moral concern.

[4]On February 4, 1994, the Petitioners filed a Notice of Appeal with the Colorado Supreme Court. On February 9, 1994, the trial court certified its December 14 order as appealable under Colo. R. Civ. Pro. 54(b). On March 25, the Petitioners filed an additional Notice of Appeal regarding the February 9 order, and the two appeals were consolidated.

jobs, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the Colorado General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation.[5]

The sponsors of Amendment 2 -- a Colorado Springs-based group known as Colorado for Family Values ("CFV") -- were concerned that special legal protections for homosexuals and bisexuals diminished the privacy, associational, religious, and economic liberty interests of others. Moreover, granting special protections for homosexuals and bisexuals also would raise serious questions about, among other things, the future of educational policy in the state and, ultimately, the State's official approval of homosexuality as a legitimate, alternative lifestyle. Thus, Amendment 2 was intended to prevent homosexuals and bisexuals from receiving preferred legal status; it was not intended to eliminate all legal rights for homosexuals and bisexuals, much less to protect those who broke the law by threatening or harming homosexuals and bisexuals. (v. 15, pp. 722, 837, 846, 853, 868).

The political campaign over Amendment 2 was characterized by competing claims of "equal rights" versus "special rights." CFV claimed that the extension of antidiscrimination laws to include sexual orientation would be tantamount to granting special rights, which are not enjoyed by the public at large. Amendment 2 faced significant opposition, including many prominent political figures, the Colorado

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[5]Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) (Pet. App. F).

Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, at least 300 Denver area religious leaders, and most of the newspapers in the State. Denver area newspapers and television stations refused to run some of CFV's advertisements, and Amendment 2's opponents out-spent its supporters by a nearly 2-1 margin. Nonetheless, the people approved Amendment 2 by a margin of 813,966 to 710,151 votes (53.4%- 46.6%).

C. Colorado Supreme Court Opinions

The Colorado Supreme Court determined that Amendment 2 not only repealed existing special protections for homosexuals and bisexuals, but also prohibited "any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Evans I* (Pet. App. D-25). Consequently, the court found, both initially and ultimately, that Amendment 2 infringed upon a "fundamental right to participate equally in the political process." *Evans II* (Pet. App. B-3) (quoting *Evans I*, Pet. App. D-21).

The essence of this "fundamental right," the court below determined, was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." Pet. App. D-14. That "right" was infringed here, the court concluded, because (1) "[p]rior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation," *id.* at D-27; and (2) Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at D-25.

The trial court rejected the Respondents' contention that homosexuals and bisexuals are a suspect or quasi-suspect class. Pet. App. C-19. The Respondents did not appeal that holding to the Colorado Supreme Court. Accordingly, the question of the legal status of homosexuals and bisexuals *as a class* under the Equal Protection Clause is not before this Court. Rather, the only issue is the validity of the "independently identifiable group" theory adopted by the court below.

The court below rested its decision upon three separate lines of authority concerning (1) the people's ability to restructure political processes (*e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969)), (2) the right to vote, (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gordon v. Lance*, 403 U.S. 1 (1971)), and (3) candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)).

In dissent, Justice William H. Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally-mandated group-based fundamental right. Justice Erickson found that this Court's decisions refute the existence of a fundamental right of any independently identifiable group to participate equally in the political process. Rather, he said, this Court's cases support strict scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. D-55. Justice Erickson took the majority to task because it had "crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent -- the

majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals." Pet. App. B-36.[6]

REASONS FOR GRANTING THE PETITION

There are few issues as divisive as the standing of homosexuals and bisexuals in American society. However, the creation of new constitutional "rights" in response to socially worrisome issues necessarily leads to unforeseen collateral problems when they are applied to other settings. The Colorado Supreme Court's holding places into constitutional doubt any attempt by state or federal governments to preempt countervailing social policies favored by lesser political units. This profound departure from existing constitutional theory, coupled with its dramatic potential impact upon self-government, provide a compelling basis for this Court to review the decision of the Colorado Supreme Court.

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT*, AND WILL REVOLUTIONIZE EQUAL PROTECTION JURISPRUDENCE

As the basis for its conclusion that "any identifiable group" possesses a fundamental right to seek enactment of local legislation benefitting it, the Colorado Supreme Court disavowed reliance upon sexual orientation as the basis for a "suspect class" and instead purported to apply a line of cases commencing with *Hunter* v.

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[6]Justice Erickson found that the appropriate standard of review under the Equal Protection Clause is the rational basis test, and further concluded that Amendment 2 easily satisfies this test. Pet. App. at B-53.

Erickson, 393 U.S. 385 (1969). The court's holding, however, conflicts with *Hunter* and the cases of this Court that authoritatively construe it: Under those cases, the Equal Protection Clause prohibits only efforts to realign the political process in a manner designed to harm a suspect class. Decisions of other courts have also held that *Hunter* and related cases are limited in this manner.

In *Hunter*, this Court reviewed an amendment to a city charter which repealed a racial anti-discrimination ordinance, and required voter approval before that type of ordinance could be put into effect. The Court made quite clear that the amendment was struck down because the city council alone could no longer enact such measures on behalf of racial minorities. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," 393 U.S. at 391, this Court observed:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

Two years later, this Court unequivocally refused to extend *Hunter* to non-suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental authorities. This Court disagreed, finding that, unlike in *Hunter*,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.* [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably, a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group.

Id. at 141-42 (1971) (emphasis supplied).

Eleven years after *Valtierra*, this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). However, this Court acknowledged that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. *Id.* at 470 (emphasis in original). Indeed, the majority underscored that the core of this line of cases is:

> [W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental

> action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

Id. at 486 (citations omitted).

Thus, *Hunter*, *Valtierra*, and *Seattle School District* call for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes -- "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School District*, 458 U.S. at 486; *see also Valtierra*, 402 U.S. at 141-42. The case is, therefore, this simple: the *Hunter* rule comes into play *only* to protect members of a suspect class. And the Colorado Supreme Court did not conclude, nor do the Respondents contend, that Amendment 2 affects members of a suspect class. In conflict with the Colorado Supreme Court, various other courts have confirmed that *Hunter*, *Valtierra*, and *Seattle School District* are confined in this manner.[7]

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[7]*See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *cf. Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *Valtierra*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991)

The Colorado Supreme Court claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964), *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Gordon v. Lance*, 403 U.S. 1 (1971). Each of these cases concerns the fundamental right to vote, not the "right" identified by the court below. *Reynolds v. Sims* stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. *Kramer v. Union Free School Dist.* held that the right to vote may not be voided on the basis of whether one is a property owner or a parent. *Gordon v. Lance* upheld a *supermajoritarian* vote requirement at all levels of government, with respect to a particular issue (bonded indebtedness), because no "independently identifiable group," much less a discrete and insular minority, was adversely affected. 403 U.S. at 5.

At root, these cases hold that each person's vote must be exercised with equal weight and freedom. These cases do not concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. Amendment 2 does not, after all, present a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections,[8] or where reapportionment or other state

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("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). *See also* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (hereafter, "*Hunter Doctrine*") (*Hunter* doctrine limited to state action embodying a racial classification).

[8]"By definition, however, a referendum, affords all similarly situated people an equal opportunity to vote. The referendum requirements in *Hunter* and *Seattle School Dist.* did not threaten to disenfranchise certain voters by placing special procedural burdens on their right to vote." *Hunter Doctrine*, 30 Vand. L. Rev. at 429. *Compare Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who

action has diluted the value of their individual votes;[9] likewise, no supermajoritarian requirement has been imposed upon homosexuals and bisexuals.

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). However, these cases are wholly inapposite. In *Williams*, this Court held that a complex state statutory structure violated the rights to vote and to associate, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court reviewed a scheme which placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and to associate, both of which are recognized fundamental rights. Neither case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to protect the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot, including the initiative process through which Amendment 2 was adopted, as all other Colorado citizens have. Rather than burdening any person's rights to

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have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

[9]*See Reynolds v. Sims*, 377 U.S. 533 (1964). *See also Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes").

vote or associate, all Amendment 2 does is raise a certain issue to a constitutional level. Neither the fundamental right to vote, nor that to petition government, encompasses a right to require the state legislature or a local government to entertain matters that are beyond its authority to address. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979).

Moreover, even if the right to vote cases could be said to support respondents' position, that would merely reinforce the need to resolve precisely how *Hunter* should be interpreted. However, in light of *Valtierra* and *Seattle School Dist.*, it is manifest that the Colorado Supreme Court's extension of *Hunter* is foreclosed by the decisions of this Court, and also conflicts with decisions of other courts. Accordingly, review by this Court of the issue presented is clearly warranted.

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS

Under the Colorado Supreme Court's decision, sexual orientation defines an "identifiable group" that warrants special constitutional protection under the Fourteenth Amendment. The Colorado Supreme Court acknowledged that other courts have held that sexual orientation does not define a "suspect class" or "quasi-suspect class" for purposes of the Equal Protection Clause, and the court below was not asked to, and did not rely upon that analysis. Pet. App. B-6 n.3, D-7-8. Nonetheless, without using the term "suspect class or quasi-suspect class," the court below created equivalent protection and achieved the same result. It is the legal analysis used to achieve that result that is presented for review.

The court below held that Amendment 2 triggered strict scrutiny under the Equal Protection Clause "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." Pet. App. at D-25. State legislation routinely makes distinctions between, and imposes burdens on, "identifiable groups" defined by characteristics such as income, occupation, property ownership, residence, or receipt of services, but the opinion does not hint whether statewide regulation on those bases would be subjected to anything but rationality review.

In contrast to the Colorado Supreme Court's determination, every federal court of appeals that has considered the issue has concluded that some form of rational relationship review applies to governmental measures that draw distinctions based upon sexual orientation. *See, e.g., Steffan v. Perry*, No. 91-5409 (D.C. Cir. Nov. 22, 1994); *High Tech Gays v. Defense Investigations Security Clearance Office*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) (rejecting strict scrutiny); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd*, 470 U.S. 903 (1985). There is, however, continuing dispute within the Circuits regarding the proper standard of review under that general rubric. *Compare Steffan v. Perry* (subjecting government classification based upon sexual orientation to traditional, deferential rational basis review) *with Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (subjecting government classification based upon sexual orientation to "'active' rational basis review" that requires scrutiny of record support for challenged classification).

In addition, the Colorado Supreme Court's extension of heightened protection based upon sexual orientation conflicts with this

Court's ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, this Court upheld, on a showing of only a rational basis, a statute criminalizing homosexual activity. If homosexual activity may be criminalized outright, it is assuredly nonsensical to say that restricting special legal protections to those professing a desire to engage in such activity requires a compelling interest. The court's decision leads to the absurd result that the only way the people of Colorado can obviate special protections for homosexuals is to criminalize homosexuality. *Cf. Richardson v. Ramirez*, 418 U.S. 24 (1974) (criminals can be denied right to vote, even after they have completed their sentences); *Woodward v. United States*, 871 F.2d at 1076 ("After *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"). *See also Steffan v. Perry*, slip op. at 18 (characterizing dissenting opinion's disapproval of the military's ban on homosexuals as "an undisciplined rebellion against the governing constitutional doctrine.")

Further review is, therefore, warranted to resolve these conflicts regarding the appropriate standard of review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE TO THE RIGHT OF SELF-GOVERNMENT

By finding an equal protection right of any "independently identifiable group" to pursue beneficial legislation at the local level, the Colorado Supreme Court has created widespread uncertainty and has potentially injected the judiciary into a broad range of issues heretofore reserved to state legislatures or to Congress.

Because the right identified by the Colorado Supreme Court is essentially unqualified, it will provide the basis to attack a wide range of routine federal and state legislation. For example, a vast array of federal tax, regulatory, and social legislation affects groups

that are "independently identifiable" based upon citizens' income, occupation, residence, health, age, or any number of other factors.[10] State regulation that might provide greater benefits or protections to any of these groups is preempted if in direct conflict with such federal legislation or if state law interferes with the goals and operation of federal law. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such assertion of pre-emption may be challenged by a contrary constitutional claim that the Equal Protection Clause guarantees the right of the affected group to seek additional benefits at the state or local level.

Similarly, every state measure, including those contained in state constitutions, which are designed to achieve uniformity or to allocate benefits and burdens, may now be challenged on federal constitutional grounds as interfering with an identifiable group's ability to secure benefits from local governments. Colorado, like other States, has, through legislation, imposed tax, safety, environmental, and other requirements upon "independently identifiable" groups. The Colorado Constitution, likewise, burdens identifiable groups that desire public abortion funding,[11] the re-

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[10]Several members of this Court have indicated that the term, "independently identifiable group" can have an extremely expansive meaning. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests," including those with "competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups"); *Karcher v. Daggett*, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.").

[11]By virtue of Colo. Const. art. V, § 50, the State is prohibited from spending public funds to assist, financially or otherwise, in the inducement of abortion, except in very narrow circumstances. Abortion advocates must seek a constitutional amendment to fund this particular medical procedure; advocates for any other medical procedure need only seek a statute. These

election of incumbent officials,[12] reorganization of certain school districts,[13] certain municipal annexations,[14] and limited gaming.[15] These measures, as well as the allocation of power to make these determinations, are "intimately related to the process of democratic self-government" committed to the States. *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *see also* U.S. Const. amend. X.[16] Colorado, like other States,

> permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Seattle School Dist. 458 U.S. at 496 (Powell, J., dissenting).[17] The Colorado Supreme Court's decision bars efforts to determine these matters at the state level and resurrects the "vested constitutional right to local decision-making" specifically rejected in *Seattle School Dist.*, 458 U.S. at 480 n.23.

Already, the federal district court in Cincinnati, Ohio has seized upon the Colorado Supreme Court's rationale to invalidate a voter-enacted anti-special rights amendment to the municipal charter based upon what it termed the "thorough analysis of the Colorado Supreme Court in *Evans v. Romer*." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) (decision based upon both "identifiable group" and "suspect class" grounds). Like the Colorado Supreme Court, the federal district court in Ohio concluded that this Court's rulings "stand for the broader proposition that States may not disadvantage *any* identifiable

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types of provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

[12]Colo. Const. art. XVIII, § 9a limits the terms of state elected officials, thereby preventing the identifiable group of supporters of particular incumbents from voting for the candidate of their choice. *See also* Colo. Const. art. IV, § 1; *id.* art. V, § 3.

[13]Colo. Const. art. XX, § 7 establishes a single school district for the City and County of Denver. Although the residents of any other school district may divide or reorganize their district simply by obtaining a statute to that effect, residents of Denver must obtain a constitutional amendment.

[14]Colo. Const. art. XX, § 1 and art. XIV, § 3, prevent the City and County of Denver from annexing land in any manner other than as a county. The citizens of Denver bear a greater burden than citizens of other Colorado cities, but this presents no cognizable constitutional question. *Cf. City of Glendale v. Buchanan*, 195 Colo. 267, 578 P.2d 221 (1978); *Board of County Comm'rs v. City & County of Denver*, 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed*, 372 U.S. 679 (1963).

[15]Colo. Const. art. XVIII, § 9 allows limited gaming only in Central City, Black Hawk, and Cripple Creek. All other Colorado communities must obtain a constitutional amendment.

[16]Indeed, in every State in the country, the people themselves retain the power to approve or disapprove amendments to their respective constitutions. Council of State Governments, *The Book of the States* at 42-43 (1990).

[17]It is important to note that Justice Powell was joined by three other Justices in dissenting from the majority's invalidation of a statewide referendum found to "impose substantial and unique burdens on racial minorities . . .." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982). In the absence of any such burden, the people of a State are free to amend their constitution through democratic processes.

group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." 838 F. Supp. at 1241 (emphasis in original).

Even if the Colorado Supreme Court's decision were or could be limited to determinations regarding rights based upon sexual orientation, it represents a dramatic and unwarranted interference in the political process that necessitates this Court's review. The political battle surrounds competing claims of rights. On one side, there are those who support measures such as Amendment 2 as a means of protecting their right to be free from intrusive special protection laws.[18] Eighteen months ago, citizens' groups in at least fourteen other States were considering sponsoring measures similar to Amendment 2;[19] now, however, the doctrine applied below is being used not only to discourage popular support for these measures, but to legally block them from the ballot.[20]

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[18]R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. of Law, Ethics & Pub. Pol'y ___, ___ (1994) ("the plaintiffs in *Evans* seek not the vote, but the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to regulate.") (Article is to be published shortly and will be lodged with the Court upon publication).

[19]Those States are Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon, and Washington. *See Anti-Gay-Rights Drive Spreads*, Denver Post, Mar. 5, 1993, at 1.

[20]*See Amendment 2: Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994, at 11A (*Evans* doctrine used to oppose ballot measures in Florida, Idaho, and Oregon).

On the other side of the debate, there are those who support special protections for homosexuals and bisexuals. Presumably, then, those statewide measures *extending* special protections to homosexuals and bisexuals[21] also infringe upon the "fundamental right" of identifiable groups, such as CFV, which oppose special protections. To rule otherwise would mean that only those favoring special protections could appeal to the state legislature or the people if they lost at the local level.[22] In truth, whichever side wins the public policy debate at the statewide level, the losers face a greater burden with respect to their right to participate at the local level. This is no violation of the Constitution; it is, rather, a basic fact of political life in this Nation since its inception.

Rather than permitting the range of issues associated with sexuality to be widely debated and determined through the political process at a variety of levels, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of political debate, insulating that debate from the state legislature or even the people themselves. The decision below strikes at the heart of voter

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[21]Eight States have enacted special protections for homosexuals and bisexuals at a statewide level. *See* Cal. Civ. Code § 51.7 (West 1982); Cal. Labor Code § 1102.1 (West 1989); Conn. Gen. Stat. Ann. § 46a-81a to 46a-81r (West 1986); Haw. Rev. Stat. §§ 378-1, 378-3 (1992 Supp.); Mass. Gen. L. ch. 1518 §§ 3, 4 (1982); Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, §§ 4503-4504 (1984), tit. 21, § 495 (1987); Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988). *See also* D.C. Code Ann. §§ 1-2502, 1-2503 (1991).

[22]In Oregon, where a statewide anti-homosexual rights proposal was defeated in 1992, communities have attempted to enact local anti-homosexual rights measures. In marked contrast to the instant case, homosexual rights advocates are arguing there that new state legislation bars such measures, because "[t]he issue of discrimination based on sexual orientation is a statewide concern, and [opponents'] divide and conquer mentality will not be tolerated." *See Oregon Lawmakers Ban Local Votes on Gay Bias*, N.Y. Times, July 30, 1993, at A-10.

sovereignty, and of federalism itself, because any distinction made by government in the establishment of its political structure becomes vulnerable to constitutional attack.[23] Any individual voter whose cause is unsuccessful in a referendum would be entitled to overturn that referendum, simply because the majority imposed its will on a minority concern. If that were the law, major public policy issues could not be decisively settled through the political process; government would be obliged continually to reconsider every policy choice.

This issue in this case is neither isolated nor inconsequential; if unchecked, the doctrine adopted by the court below threatens completely to reshape our political processes, the highest expression of which is the power of the people to establish and amend their state constitutions as they deem appropriate. In setting aside Amendment 2, the Colorado Supreme Court nullified the will of the people of Colorado, solely because it believed the decisions of this Court compelled such a result. The uncertainty of the future of popular self-government not only in Colorado, but indeed every state and local government in the entire Nation, warrants the grant of certiorari.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. Alternatively, the Court should reverse summarily on the basis of *James v. Valtierra*.

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[23] "The potential scope of the right recognized by the Colorado court in *Evans* is breathtaking. If the court means what it says, it has discovered a constitutional right of any 'independently identifiable class of persons' to have its political agenda insulated against the constitutional rights of others." R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of Law, Ethics & Pub. Pol'y at ___.

Respectfully submitted this 9th day of December, 1994.

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA48
Appeal from the District Court, City and County of Denver,
92CV7223

MANDATE

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNSEL OF ASPEN,

Plaintiff-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,

Defendants-Appellants.

This cause having been brought to this court as an appeal from the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of the District Court of the City and County of Denver shall be, and the same hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the cost of $260.00 is awarded for the Plaintiffs-Appellees and against the Defendants-Appellants, pursuant to C.A.R. 39.

NOW THEREFORE, jurisdiction of this cause is returned to the District Court of the City and County of Denver.

WITNESS, the HONORABLE LUIS D. ROVIRA, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 14th day of November, 1994.

MAC V. DANFORD
Clerk of the Supreme Court

_____
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APPENDIX B

SUPREME COURT, STATE OF COLORADO
NOS. 94SA48 & 94SA128 October 11, 1994

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN, Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO, Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. Jeffrey Bayless, Judge

EN BANC JUDGMENT AFFIRMED

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (defendants) appeal the trial court's entry of a permanent injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, petitions which would amend the Colorado Constitution by adding a new section 30 to article II were filed with

the secretary of state. The proposed amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a vote of 813,966 to 710,151 (53.4% to 46.6%). The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, Richard G. Evans, along with eight other persons, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen (plaintiffs) filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional.

The trial court conducted an evidentiary hearing to consider plaintiffs' motion for a preliminary injunction. Subsequently, the court granted the motion and prohibited the defendants from enforcing Amendment 2 pending the outcome of a trial on the merits.[1]

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[1]The trial court concluded that plaintiffs had met the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable

The defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*). In *Evans I*, we first addressed the question of the legal standard to be applied in reviewing the trial court's entry of the preliminary injunction. Following the precedent of the United States Supreme Court, we held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.* at 1282.

After recognizing that "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation" and that the "'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures," we held:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

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probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits.

Id. at 1285. We concluded that the trial court did not err in granting the preliminary injunction enjoining defendants from enforcing Amendment 2.

After our decision in *Evans I*, the case was remanded to the trial court to determine whether Amendment 2 was supported by a compelling state interest and narrowly tailored to serve that interest. *Id.* at 1286. At trial the defendants offered six "compelling" state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.[2]

The trial court concluded that the interest in deterring "factionalism" was in truth, nothing more than an attempt to impede the expression of "a difference of opinion on a controversial political question . . . ." It concluded that the first governmental interest was not a compelling state interest but rather, that "the *opposite* of defendants' claimed compelling interest is most probably compelling," i.e., encouraging the competition of ideas with uninhibited, robust, and wide-open political debate.

The trial court found that the interest of preserving the State's political functions, premised on the Tenth Amendment right of the states to amend state constitutions, was not a compelling interest since "[d]efendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution."

With respect to the interest in preserving the ability of the state to remedy discrimination against groups which have been held to be suspect classes, the trial court stated its doubt as to whether fiscal concerns of the state rise to the level of a compelling state interest. The court held that Amendment 2 could not be understood to further this interest because,

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[2]The state has not reasserted the sixth interest on appeal.

> [d]efendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinances.

Thus, the trial court concluded that "defendants' offered evidence of lack of fiscal ability [is] unpersuasive in all respects."

The trial court held that preventing the government from interfering with personal, familial, and religious privacy was, in part, a compelling state interest. Although the court acknowledged promotion of family privacy is a compelling state interest, it held that defendants never established what they meant by the term "family." Moreover, defendants failed to "tie-in . . . the interest of protecting the family and denying gays and bisexuals the right to political participation . . . ."

The trial court also found that preserving religious liberty was a compelling state interest. However, it held that Amendment 2 was not narrowly tailored to serve this interest. "The narrowly focused way of addressing [antidiscrimination protections for gay men, lesbians, and bisexuals] is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process."

The trial court rejected the personal privacy component of the argument on the grounds that "[t]he general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right."

The interest in preventing government from subsidizing the political objectives of a special interest group was rejected on the grounds that "[t]his claimed compelling interest was not supported by

any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest."

Similarly, the trial court rejected the argument that the protection of children is a compelling state interest served by Amendment 2 because "[d]efendants have failed to present sufficient evidence to support this claimed compelling interest."

Accordingly, because the trial court concluded that Amendment 2 was not necessary to support any compelling state interest and narrowly tailored to meet that interest, it permanently enjoined the enforcement of Amendment 2.[3]

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[3]The court rejected plaintiffs' argument that gay men, lesbians, and bisexuals should be found to be either a "suspect class" or a "quasi-suspect class." The trial court rejected this argument because it concluded that "[h]omosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements [necessary] to be found a suspect class." This ruling has not been appealed and thus, we do not address it.

The trial court also declined plaintiffs' request to analyze the constitutionality of Amendment 2 under the "rational basis test." In so doing, it stated:

> The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

Plaintiffs have again argued to this court that Amendment 2 does not pass constitutional muster under the less stringent rational basis test. They argue that each of the state's purported compelling interests are not rationally related to the enactment of Amendment 2. Because we decline to revisit our holding in *Evans I, see infra* Part II, and again conclude that Amendment 2 affects a fundamental right, its constitutionality must be analyzed under the strict scrutiny standard of review. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("laws that impinge upon the exercise of a 'fundamental right' [require] the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest").

On appeal the defendants argue that: (1) the legal standard set forth by this Court in *Evans I* for assessing the constitutionality of Amendment 2 should be reconsidered; (2) Amendment 2 is supported by several compelling state interests and is narrowly tailored to meet those interests; (3) that the unconstitutional provisions of Amendment 2 are severable from the remainder; and (4) Amendment 2 is a valid exercise of state power under the Tenth Amendment to the United States Constitution.

II

Defendants first ask that we reconsider the constitutional principles articulated in *Evans I*, but they offer no arguments that were not then considered and rejected by this court. We see no reason to revisit that decision. We reaffirm our holding that the constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review.[4]

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[4]After this court decided *Evans I*, a Federal District Court enjoined the enforcement of a voter enacted amendment to the Cincinnati, Ohio city charter almost identical to Amendment 2, which prohibited the city from enacting any ordinance, regulation, rule or policy which entitled gay men, lesbian or bisexual individuals to minority or protected status. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) (*Equality I*). The court found it highly likely that the right to participate equally in the political process is a fundamental right, protected by the Equal Protection Clause and requires strict judicial scrutiny on review. The court concluded relevant Supreme Court precedent supported the proposition that "[s]tates may not disadvantage *any* identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." *Id.* at 1241 (citing *Evans I*, 854 P.2d 1270, 1281, 1283 (Colo. 1993); *Gordon v. Lance*, 403 U.S. 1, 7 (1971); *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)). After a trial on the merits, the court made the injunction permanent holding *inter alia* that the amendment violated the plaintiffs' fundamental right to equal access to the political process. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, Slip op. at 26, 1994 WL 442746 at *11 (S.D. Ohio 1994). The court explained "any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates

III

A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is "*necessary* to promote a *compelling* state interest," *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), and does so in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982). The question of what constitutes a compelling state interest is one of law and thus, we review the trial court's ruling *de novo*. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 772 n.30 (5th Cir. 1993); *Scott v. Rosenberg*, 702 F.2d 1263, 1274 (9th Cir. 1983). Defendants argue that Amendment 2 is supported by a number of compelling state interests and is narrowly tailored to serve those interests.[5]

A

Defendants' first asserted governmental interest is in protecting the sanctity of religious, familial, and personal privacy. Freedom of religion is expressly guaranteed by both the First Amendment to the United States Constitution and article II, section 4 of the Colorado Constitution and stands at the core of our Nation's history and tradition. It is among the highest values of our society. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943). There can be little doubt that ensuring religious freedom is a compelling governmental interest.

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their fundamental rights." *Id.* (citing *Equality I*, 838 F. Supp. at 1238-42; *Evans I*, 854 P.2d at 1282.).

[5]We note at the outset that defendants argue that all of the asserted compelling interests which support Amendment 2 are narrowly tailored on the grounds that "there is absolutely *no other way* that the people could further the common elements of the various compelling interests but through the enactment of Amendment 2." We do not specifically address this argument for two reasons. First, as will be made clear below, none of the interests identified by defendants are compelling. Second, defendants never articulate what the "common elements of the various compelling interests" are, and we are simply unable to ascertain any specific "common elements" which all of those interests share.

Defendants argue that Amendment 2 is necessary to serve this interest because "[u]nder the ordinances preempted by Amendment 2, individual landlords or employers who have deep-seated and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions, under threat of government sanctions." In support of this proposition, defendants rely on *Smith v. Commission of Fair Employment & Hous.*, 30 Cal. Rptr.2d 395 (Cal. App. 3 Dist. 1994), *pet. for reveiw granted and opinion superseded by Smith v. Fair Employment & Hous. Comm'n*, 33 Cal. Rptr.2d 567, 880 P.2d 111 (Cal. Sept. 8, 1994). (*See* Cal. Ct. Rules 976(d) opinion withdrawn from publication pending review).

In *Smith*, the plaintiff challenged the ruling of the California Commission of Fair Employment and Housing which found that she had impermissibly discriminated, based on their marital status, against a couple who sought to rent housing. The couple was unmarried and the plaintiff refused to rent to them on the grounds that doing so would violate her deeply-held religious beliefs. Plaintiff was ordered to cease and desist marital discrimination; post a notice announcing her violation of California law for ninety days; permanently post a notice to rental applicants of their rights and remedies under California antidiscrimination laws; and sign both notices and provide copies to each person who subsequently expressed an interest in renting her property. *Id.* at 397-98.

The California court of appeals concluded that the commission's order substantially burdened plaintiff's free exercise rights because she "cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples." *Id.* at 399.[6]

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[6]Nevertheless, the court held, "it is clear that free exercise of religion as protected by the First Amendment is not actionably infringed by applying to plaintiff a facially neutral statute which merely proscribes marital status discrimination, notwithstanding plaintiff's religious scruples against renting to unmarried couples." *Id.* at 401. This conclusion was reached based on the fact that "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 400 (quoting *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. at 878 (1990)).

Assuming *arguendo* that ordinances such as that in effect in Boulder, which prohibit discrimination against gay men, lesbians, and bisexuals in housing and employment but which contain no exception for religiously-based objections, substantially burden the religious liberty of those who object to renting or employing gay men, lesbians, or bisexuals on religious grounds, the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose simply would be to require that antidiscrimination laws which include provisions for sexual orientation also include exceptions for religiously-based objections. This is precisely what the Denver antidiscrimination laws provide. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-92, 28-93, 28-95 to 28-97 (1992 Supp.). Similar exemptions for religious organizations are found in federal antidiscrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-1 (1994 Supp.) (exempting religious organizations from the prohibition against employment discrimination); 42 U.S.C. § 3607 (1994 Supp.) (exemption for religious organizations in housing and public accommodation).[7] Defendants do not, and we doubt that they could, argue that the Denver ordinance impairs religious freedom. Indeed, Joseph Broadus, who testified as an expert witness on behalf of the defendants, testified that imposing a religiously-based exemption on antidiscrimination laws intended to protect gay men, lesbians, and bisexuals would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty.

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[7]We do not rule today on the adequacy of any religious exemptions contained in existing antidiscrimination laws. The question whether antidiscrimination laws violate the free exercise clause of the First Amendment by prohibiting discrimination based on marital status has recently been addressed by two state supreme courts with mixed results. *See Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (Statutory mandate that landlords cannot discriminate against cohabitating unmarried couples substantially burdened landlords' sincerely held religious belief protected by the Massachusetts state constitution. Case remanded to decide whether a compelling governmental interest in eliminating such discrimination justified the infringement); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (enforcement of facially neutral fair housing laws did not violate a landlord's right to free exercise of religion under either the state or federal constitution).

It is clear that Amendment 2, which affects the fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process, is not the least restrictive means of ensuring religious liberty, and is not narrowly tailored to serve the compelling governmental interest in ensuring the free exercise of religion.

Defendants also argue that Amendment 2 serves the compelling interest of preserving "familial privacy." Family privacy is characterized by defendants as the right "of some parents to teach traditional moral values" to their children. As support, defendants cite authority recognizing the sanctity of the family and the central role the family plays in society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental role is "basic in the structure of our society").

Defendants contend that the "right of familial privacy" is "severely undermine[d]" by the enactment of antidiscrimination laws protecting gay men, lesbians, and bisexuals because "[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined." This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government *endorse* certain values as moral or immoral. While it is true that parents have a constitutionally protected interest in inculcating their children with their own values, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), defendants point to no authority, and we are aware of none, holding that parents have the corresponding right of insuring that government endorse those values.

The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("Never to our knowledge has the Court . . . require[d] the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."). Furthermore, it is clear that the government does not burden an individual's constitutional rights merely because it endorses views with which that individual may disagree. *See Block v. Meese*,

793 F.2d 1303, 1312-14 (D.C. Cir. 1986) (then Judge Scalia concluding that "[a] rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family . . . ."). *Id.* at 1313.

Consequently, fully recognizing that parents have a "privacy" right to instruct their children that homosexuality is immoral, we find that nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right. With or without Amendment 2, parents retain full authority to express their views about homosexuality to their children. We believe that Amendment 2 is neither necessary nor narrowly tailored to preserve familial privacy because that right is not implicated by the laws and policies which Amendment 2 proscribes.

Defendants also argue that Amendment 2 serves the compelling state interest in preserving "personal privacy." While it is not entirely clear what is meant by the phrase, it appears that the defendants are referring to the right of "associational privacy" which will be impaired in the absence of Amendment 2 because individuals may be forced to associate with gay men, lesbians, and bisexuals in the rental of housing.[8]

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[8]The defendants' entire argument addressing the issue of personal privacy constitutes a single paragraph. It reads:

> The court below found that both religious liberty and familial privacy are indeed compelling interests. However, the court rejected the notion that personal privacy could be a compelling interest, finding that the Defendants had addressed it only "tangentially." This finding ignores testimony such as that offered by Ann Ready of Madison, Wisconsin, who shared a house with four other women, but refused to share it with a lesbian. She stated that she "had rejected several heterosexual males for the same reason, namely the potential for [unwanted] physical, sexual attraction." Ms. Ready was subsequently found to have violated both municipal and state sexual orientation laws. That preventing this sort of intrusion into personal matters of the utmost privacy is a compelling interest,

As the Supreme Court has explained, the right of associational privacy protects associations involving,

> deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in the decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

While preserving associational privacy may rise to the level of a compelling state interest, Amendment 2 is not narrowly tailored to serve that interest. Amendment 2 would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals (because they are gay, lesbian, or bisexual) in *all* aspects of commercial and public life, no matter how impersonal. Amendment 2 affects a vast array of affiliations which in no way implicate associational privacy. None of the criteria needed to precipitate associational privacy rights exists: there is no "special community" distinguished by "selectivity," "relative smallness," or any concern with "distinctively personal aspects of one's life." *Id.*

> [A]n association lacking these qualities--such as a large business enterprise--seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

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should be obvious.

(citations to the record omitted).

Id. (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)).

To the extent that antidiscrimination laws protecting gay men, lesbians, and bisexuals have the potential to implicate associational privacy rights, a narrower way of avoiding this conflict would be to exempt the sort of intimate associations identified in *Roberts* from the scope of such laws. For instance, landlords could be allowed to discriminate against homosexuals in the rental of owner-occupied housing -- the so-called "Mrs. Murphy's Boarding House" exception. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3603(b) (1988 & 1994 Supp.) (exempting certain owner-occupied housing from the Fair Housing Act); *Statutory History of the United States: Civil Rights, Part II* 1741-52, 1805-06 (B. Schwartz ed. 1970) (detailing legislative history and policies underlying "Mrs. Murphy's Boarding House" exemption in Fair Housing Act). Similar exemptions already exist under Colorado law. For instance, Denver's antidiscrimination ordinance exempts from its housing and public accommodation provisions multiple unit dwellings of not more than two units where one of the units is owner occupied. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-95(b)(2) & 28-96(b)(2) (1991). Similarly, the Colorado Civil Rights statute exempts from the definition of "housing" any room offered for rent or lease in a single-family dwelling occupied in part by the owner. § 24-34-501(2), 10A C.R.S. (1988).

Amendment 2, however, does no such thing. Rather, it prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved and the extent of intimacy inherent in those relationships. Amendment 2 sweeps more broadly than necessary and is not narrowly tailored to serve the governmental interest in preserving associational privacy.

B

Defendants next assert that because "laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. . . . Amendment 2 is an appropriate means whereby the people sought to focus government's limited resources upon those

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officer for Denver's antidiscrimination ordinance testified that Denver's protection of gay men, lesbians, and bisexuals has not prevented Denver from protecting other groups or had any significant fiscal impact on Denver. The chief of Wisconsin's Civil Rights Bureau testified, based on twelve years experience with Wisconsin's enforcement of its antidiscrimination laws, that protection of gay, lesbian, and bisexual persons has not limited enforcement of other parts of the Wisconsin statutes. The trial court found that protecting gay men, lesbians, and bisexuals from discrimination "has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinances."[10] This finding is supported by the record and substantiates the conclusion that Amendment 2 is not necessary to serve the governmental interest asserted.

Even if protecting gay men, lesbians, and bisexuals from discrimination has some fiscal impact on the state, Amendment 2 is not narrowly tailored to serve that interest. Ensuring that certain racial, gender, or ethnic groups receive undiminished funds for civil rights enforcement could easily be accomplished by ear-marking funds to cover the costs of such enforcement. Under such an arrangement, any protection for gay men, lesbians, and bisexuals would have to be funded from sources other than funds reserved for the protection of the specified suspect classes. The governmental interest in insuring adequate resources for the enforcement of civil rights laws designed to protect suspect classes from discrimination need not be accomplished by denying the right of gay men, lesbians, and bisexuals from participating equally in the political process. Rather, this interest can be served in such way that no persons' fundamental rights need be denied.

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legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.

[10]The trial court rejected the testimony of the defendants' witnesses who, while having no experience in the enforcement of civil rights laws intended to protect gays, lesbians, and bisexuals, speculated that doing so would create increased costs and limit the ability to enforce laws intended to protect suspect classes.

The defendants' second asserted governmental interest in support of Amendment 2 is neither necessary nor narrowly tailored to serve that interest.

C

Defendants next argue that Amendment 2 "promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms."[11] In support of this proposition, defendants define two related norms which are promoted by Amendment 2: Amendment 2 preserves heterosexual families and heterosexual marriage and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral.

The only authority relied on to support the view that the protection of morality constitutes a compelling governmental interest is *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). Defendants cite the plurality opinion in *Barnes* for the proposition that "the State's interest in protecting order and morality is compelling; substantial; subordinating; paramount; cogent; strong." *Barnes* does not support defendants' contention that protecting public morality constitutes a compelling governmental interest.

In *Barnes*, four Justices held that "the public indecency statute . . . furthers a *substantial* government interest in protecting

[11]There is some dispute as to whether consideration of this asserted interest is properly before this court. Plaintiffs point out that in contrast to the six governmental interests addressed by the trial court, morality was not listed in the state's disclosure certificate or the state's opening statement at trial as a separate interest supporting Amendment 2.

Defendants argue that it presented the interest in public morality to the district court and as support, cites an introductory paragraph contained in its brief to that court which stated that "the issue of public morality . . . permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right." In our judgment, this is sufficient to conclude that the interest of public morality was presented to the trial court as a rationale for Amendment 2 and thus, this asserted interest is properly before this court.

order and morality." *Barnes*, 501 U.S. at 567 (emphasis added). Justice Souter provided the fifth vote in *Barnes*, however he did not rely "on the possible sufficiency of society's moral views to justify the limitations at issue." *Id.* at 582 (Souter, J., concurring). Rather, he was of the opinion that the Indiana law at issue (which prohibited completely nude dancing) was permissible due to the "State's substantial interest in combating the secondary effects of adult entertainment establishments . . . ." *Id.* None of the justices in *Barnes* concluded that furthering public morality constitutes a compelling state interest.

Consequently, defendants have cited no authority to support the proposition that the promotion of public morality constitutes a compelling governmental interest, and we are aware of none. At the most, this interest is substantial. However, a substantial governmental interest is not sufficient to render constitutional a law which infringes on a fundamental right – the interest must be compelling. *See Plyler v. Doe*, 457 U.S 202, 217 (1982).

Furthermore, even recognizing the legitimacy of promoting public morals as a governmental interest, it is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals. First, we reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will "choose" to "become homosexual" if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates. For example, Wisconsin, the state with the oldest "gay rights" law in the nation, enacted in 1982, reports that the divorce rate in Wisconsin declined after the enactment of its antidiscrimination statute. *See* Center for Health Statistics, Division of Health, Wisconsin Dep't of Health & Social Services, *1990 Wisconsin Vital Statistics Report*, at p. 93, Figure 13 (divorce rates in Wisconsin peak at 3.9 divorces per 1,000 population in 1981 and decline thereafter to 3.6 divorces per 1,000 population in 1990).

Defendants also argue that the "endorsement" of homosexuality undermines marriage and heterosexual families because antidiscrimination laws implicitly endorse that conduct which is deemed an improper basis for discrimination. We are of the opinion,

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above, however, we do not believe that antidiscrimination laws constitute an endorsement of the characteristics that are deemed an unlawful basis upon which to discriminate against individuals. *See infra* pp. 25-26.

More significantly, defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose of implementing the political objectives of the governed so long as that can be done consistently with the constitution. The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group." If defendants' argument had any merit at all, the compelling state interest defined would justify striking down almost any legislative enactment imaginable. This is clearly not the law. No citation of authority is needed to make the point.

We reject defendants' assertion that Amendment 2 is justified by the compelling governmental interest in not having the state endorse the political objectives of a special interest group.

E

Defendants claim that Amendment 2 "serves to deter factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." More specifically, they argue that "Amendment 2 is intended, not to restrain the competition of ideas," but "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." Amendment 2 accomplishes this end by eliminating "city-by-city and county-by-county battles over this issue."

We reject the argument that the interest in deterring factionalism, as defined by defendants, is compelling. Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. "[T]here is no significant state or public interest in curtailing debate or discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). *See also*

Williams v. Rhodes, 393 U.S. 23, 32 (1968). We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

In support of the asserted compelling interest in deterring factionalism, defendants rely on *Storer v. Brown*, 415 U.S. 724 (1974). *Storer* involved a state requirement that proponents of *any* viewpoint resign from political parties and not run in those parties' primaries if the proponents intend to run as independent candidates. The purpose of this neutral election procedure was to insure that independent candidates were more than merely sore losers who, having lost one primary, ran as "independents" to satisfy "short-range political goals, pique, or personal quarrel." *Id.* at 735.

Neither *Storer*, nor any other case we are aware of supports the proposition that there is a compelling governmental interest in preventing divisive issues from being debated at all levels of government by prohibiting one side of the debate from seeking desirable legislation in those fora. We conclude that the interest in deterring "factionalism" is not a compelling state interest.

F

Defendants argue that each of the governmental interests, while individually adequate to validate Amendment 2, "are especially so when considered in the aggregate." None of the interests identified by the state is a necessary, compelling governmental interest which Amendment 2 is narrowly tailored to advance. Lumping them together as one grandiose (and rather ill-defined) interest makes them no more necessary, compelling, or narrowly tailored. In this context, the whole *is* equal, and is as equally deficient as the sum of its parts.

IV

Defendants next argue that the provisions of Amendment 2 are severable and that only those provisions pertaining to "sexual orientation" should be stricken as unconstitutional: "Plaintiffs have only challenged . . . the question of sexual *orientation.* They have not claimed or made any suggestion that Amendment 2's restrictions concerning homosexual or bisexual *conduct, practices,* and *relationships* are in any way constitutionally suspect."

In so arguing, defendants not only mischaracterize plaintiffs' position, but fundamentally misconstrue the intent of Amendment 2. In *Evans I,* we held that Amendment 2 had been shown to a reasonable probability to be unconstitutional on the grounds that it affected "the fundamental right to participate equally in the political process . . . . by 'fencing out' an independently identifiable class of persons . . . ." *Id.* at 1282. The constitutional infirmity of Amendment 2 recognized in *Evans I* was not limited to sexual orientation as opposed to restrictions concerning homosexual or bisexual conduct, practices, and relationships. To the contrary, it was based on the fact that Amendment 2 sought to deny an independently identifiable group's right to participate equally in the political process.

"Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body." *Robertson v. City and County of Denver,* 874 P.2d 325, 335 (Colo. 1994) (quoting *City of Lakewood v. Colfax Unlimited Ass'n, Inc.,* 634 P.2d 52, 70 (Colo. 1981)).

We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable. In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is intended to deny that same right to persons based on "homosexual, lesbian or bisexual . . . conduct, practices or relationships . . . ."

Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way

of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see Bowers v. Hardwick,* 478 U.S. 186 (1986), is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true that such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

V

Last, defendants argue that even if Amendment 2 is in conflict with the Fourteenth Amendment to the United States Constitution, it is nevertheless a constitutionally valid exercise of the people's reserved powers under the Tenth Amendment.[12] In short, the argument is that the power to amend the state constitution is reserved to Colorado's voters under the Tenth Amendment, and even if the voters amend the state constitution in such a way as to violate the federal constitution, such an amendment is *per se* valid.

In support of this argument, defendants rely on *Gregory v. Ashcroft,* 501 U.S. 452 (1991). In *Gregory,* the Supreme Court held that the Age Discrimination in Employment Act does not apply to state court judges. In reaching this conclusion, the Court noted that decisions concerning the necessary qualification of state court judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government and the character of those who exercise government authority, a state defines itself as a

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[12]The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

sovereign." *Id.* at 460. The court concluded that "Congressional interference with *this* decision of the people of Missouri, *defining their constitutional officers,* would upset the usual constitutional balance of federal and state powers." *Id.* (emphasis added).

Gregory applies only to cases involving federal interference with the qualification of constitutional officers. *See, e.g., Equal Employment Opportunity Comm'n v. Massachusetts,* 987 F.2d 64, 68-69 (1st Cir. 1993) (*Gregory* applies only when federal law interferes with state's definition of policy-making officials' qualifications); *Tranello v. Frey,* 962 F.2d 244, 249 (2d Cir. 1992) (same); *May v. Arkansas Forestry Comm'n,* 993 F.2d 632, 635-36 (8th Cir. 1993) (same); *Associated Builders & Contractors v. Perry,* 817 F. Supp. 49, 53 n.3 (E.D. Mich. 1992) (same).

States have no compelling interest in amending their constitution in ways that violate fundamental federal rights. *Reitman v. Mulkey,* 387 U.S. 369 (1967) (no reserved power to make right to discriminate a part of the state's basic charter); *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").

We reject defendants' argument that Amendment 2 is a constitutionally valid exercise of state power under the Tenth Amendment.

VI

The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way. Amendment 2 is not severable and not a valid exercise of state power under the Tenth Amendment. Accordingly, we affirm the trial court's entry of a permanent injunction barring its enforcement.

JUSTICE SCOTT concurs.
JUSTICE ERICKSON dissents.

Evans v. Romer, Nos. 94SA48 and 94SA128
JUSTICE SCOTT concurring:

I agree with the majority and join in its opinion and judgment. Amendment 2 is unconstitutional because it offends the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. I write separately, nevertheless, to suggest that Amendment 2 impermissibly burdens the right "peaceably to assemble and petition the government for redress of grievances," a right guaranteed to *every* citizen. Hence, the district court's permanent injunction should be upheld under the Privileges or Immunities Clause of the Fourteenth Amendment.

I

Citizenship, not the good graces of the electorate, is the currency of our republican form of government. Over 130 years ago, this nation was engaged in a great Civil War which tested our constitutional form of government as has no other time in our history. That great battle, joined to address issues of slavery and race, actually resolved much more. History teaches us that, in fact, our nation addressed a question of paramount importance: whether any state may, by legislative enactment or popular referendum, deny or refute the Union of the several states and render asunder the bonds of our constitutional form of government. Although answered at Appomatox, today we are called upon to answer, if not resolve, that question once more.

The federal Constitution, as submitted to the various states, created certain rights which the states cannot diminish. By joining the Union, Colorado "cannot be viewed as a single, unconnected, sovereign power, on [which] . . . no other restrictions are imposed than may be found in its own Constitution." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 85, 135 (1810). Writing for the court in *Fletcher,* Chief Justice Marshall opined that each state "is a part of a large empire, . . . is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to . . . the several states, which none claim a right to pass." Id. Thus, within the limits of state sovreignty, most important questions are decided by the electorate. However, those matters in

which the result intrudes upon a protected liberty or fundamental right cannot be determined in the voting booth.

The framers originally recognized this potential for harm and understood that not every issue can be resolved by the vote of a majority. In The Federalist Papers, James Madison identified the covenant of "a well constructed Union" as its promise to protect and preserve inviolate certain rights of all citizens. The Federalist No. 10, at 42 (J. Madison) (Wills 1982). Madison noted that under other forms of government, "measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority." *Id.* at 43. Madison further stated:

> The interest of the man must be connected with the constitutional rights of the place . . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to controul itself.
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> . . . .
>
> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.

Id., No. 51, at 262 & 264. Appropriately, Madison suggested, the "cure" rests in a republican form of government -- a Union in which there is a "tendency to break and control the violence of faction." *Id.*, No. 10 at 42. The obligation to "guard one part of the society against the injustice of the other part" exists whether the oppressive act is the result of referendum or other state action. Hence, every individual is promised full citizenship under a written Constitution which, as Justice Harlan opined, "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1895) (Harlan, J., dissenting).

Judge Robert Bork, addressing the same covenant, wrote of what he referred to as the "Madisonian dilemma," stating:

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority.

Robert H. Bork, The Tempting of America: The Political Seduction of the Law 139 (1990) (hereinafter "Bork"). Such a dilemma can only be resolved by resort to a neutral written principal, the Constitution. We should look first to the text and to the understanding manifested in the words used by the framers. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819) (let the end be "within the scope of the constitution, and all means which are appropriate . . . which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional"); *Colorado Ass'n of Public Employees v. Lamm,* 677 P.2d 1350, 1353 (Colo. 1984) ("Where the language of the constitution is plain and its meaning clear, that language must be declared and enforced as written."); *see also* Bork at 145 ("If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives."). Where the words of the Constitution are unambiguous, we need not look further.

II

A

Section 1 of the Fourteenth Amendment of the United States Constitution declares: "All persons born or naturalized in the United

States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. Const. amend XIV, section 1.[1] The Fourteenth Amendment, in section 1, made state citizenship derivative of national citizenship and transferred to the federal government a portion of each state's control over civil and political rights.[2]

By the force of an unfortunate history and a refusal to rely upon the plain text of the constitution, our Fourteenth Amendment jurisprudence has resulted in a Privileges or Immunities Clause that has been eclipsed by the Equal Protection and Due Process Clauses. As a consequence, no important line of decision rests solely on the Privileges or Immunities Clause. Early on, in fact, the original understanding was virtually written out of the Constitution by the United States Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

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[1]The words "privileges" and "immunities" first appear in the Constitution in article IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). By virtue of Article IV, state citizenship carries with it the right to nondiscriminatory treatment within each state of citizens of all the states.

Consistent with the text and for purposes of distinction, the Article IV clause will be referred to as the "Privileges *and* Immunities Clause," and the Fourteenth Amendment clause will be referred to as the "Privileges *or* Immunities Clause."

[2]It is widely agreed that section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. William Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 104 (1988) ("Section one was added to the amendment at least in part to remove doubts about the constitutionality of the 1866 act."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1389 (1992). Many commentators have suggested that the amendment actually writes the substance of the 1866 Act into the Constitution. *See id.*

In the *Slaughter-House Cases*, decided in 1873, a majority of the Court acknowledged the Privileges or Immunities Clause of the Fourteenth Amendment, but limited its effects to those rights earlier existing under Article IV, without recognizing the creation of a new national citizenship. In his opinion for the Court in *Slaughter-House Cases*, Justice Miller declared that the rights conferred by national citizenship were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[3] 83 U.S. (16 Wall.) at 79. A review of the legislative history, however, will not permit such an ambivalent view.[4] The statements of the framers of the Fourteenth Amendment, Senator Howard and Representative Bingham, confirm that the Privileges or Immunities Clause was originally intended to confer and make inviolate certain minimal rights embodied in national citizenship.[5]

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[3]Subsequent cases suggested an even narrower definition of the rights of national citizenship, but in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court in dictum finally settled on the *Slaughter-House* definition as correct.

[4]As Justice Field observed in dissent, and it is not really possible to deny:

> If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

Slaughter-House Cases, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

[5]As Senator Howard stated: "it is certain the clause was inserted in the Constitution for some good purpose." Cong. Globe. 39th Cong., 1st Sess., part 3, p. 2765 (1866); *see generally* John H. Ely, Democracy and Distrust 22 (1980).

The Fourteenth Amendment Privileges or Immunities Clause was patterned after a similar clause in Article IV, Section 2.[6] The Fourteenth Amendment Clause was thought by its framers to be one of the central elements of section 1. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866) ("This is the first clause, and I regard it as very important.") (statement of Senator Howard); *see generally* John H. Ely, Democracy and Distrust 22 (1980) (hereinafter "Ely"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

The Article IV Privileges and Immunities Clause imposes substantive limits upon the states. *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825). In *Corfield*, Justice Washington held that this clause protected against state action the privileges "which are, in their very nature, fundamental; which belong, of right, to the citizens of all free governments."[7] *Corfield*, 6 F. Cas. at 551. Washington went on to state:

> What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire

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[6]Representative Bingham, the Congressperson who framed the Privileges or Immunities Clause of the Fourteenth Amendment, pointed to the Privileges and Immunities Clause of Article IV as his model. Cong. Globe, 39th Cong., 1st Sess., part 2, pp. 1033-34 (1866).

[7]As Ely has observed, the drafters of the Fourteenth Amendment "repeatedly adverted to the *Corfield* discussion as the key to what they were writing." *See* Ely at 29; Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 555-56 (1991). *Corfield* was invoked by both Senator Trumbull and Representative Wilson, the managers of the Civil Rights Act, to explain the fundamental rights of citizenship secured by the Act. Similarly, Senator Howard quoted from *Corfield* during the Congressional debates regarding adoption of the fourteenth amendment. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866).

> and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52.

It was this opinion which became the pole star for Representative Bingham and Senator Howard, the framers of the Fourteenth Amendment. Presenting the Fourteenth Amendment to the Senate, Senator Howard disclosed "the views and the motives which influenced that committee," stating:

> To [the privileges and immunities listed in *Corfield*], whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature -- to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; *the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people*; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search and seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
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> . . . it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. . . . *The great objective of the first section of this amendment is, therefore, to restrain the power of the States and compel*

them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866) (emphasis added).

Senator Howard's list of privileges or immunities, which incorporated *Corfield*, was representative rather than exhaustive. No case has ever attempted to identify the totality of implied federal rights guaranteed by the Privileges or Immunities clause. However, in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Supreme Court did provide a list of privileges or immunities which it recognized: (1) the right to pass freely from state to state;[8] (2) *the right to petition Congress for redress of grievances*; (3) the right to vote for national officers; (4) the right to enter the public lands; (5) the right to be protected against violence while in the lawful custody of a United States Marshal; and (6) the right to inform United States authorities of violation of its laws. *Twining*, 211 U.S. at 97. These rights of national citizenship receive absolute protection in the sense that the states never could have a legitimate interest in terminating completely any of these rights. Rotunda & Nowak, Treatise on Constitutional Law 351 (2d ed. 1992).

III

The United States Supreme Court has repeatedly held that the right to vote is fundamental to the rights of citizenship and to a free and democratic society. *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1963); *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886). In *Evans I*, we held the right to participate equally in the political process to be a fundamental right. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).[9] By

[8]*See Edwards v. California*, 314 U.S. 160, 178 (1941), (the right of interstate travel is an essential "incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment . . . ").

[9]*See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gordon v. Lance*, 403 U.S. 1, 5 (1971); Frank I. Michelman, *Conceptions*

"participate equally," although not assuring any political result, we did contemplate the right of the people peaceably to assemble and petition the government for a redress of grievances. This right to participate, an attribute of the new national citizenship, was meant by the framers of the Fourteenth Amendment to be a personal right guaranteed and secured by the Privileges or Immunities Clause. *See* Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866).

It should be axiomatic that the right peaceably to assemble and petition government implies the ability of the duly elected representatives to respond, if so persuaded or predisposed. Yet, if enforced, Amendment 2 provides that the state, acting "through any of its branches or departments, or any of its agencies, political subdivisions, municipalities or school districts," shall not "enact, adopt or enforce any statute, regulation, ordinance or policy" granting to citizens a "claim of discrimination" based on homosexual or lesbian status or sexual orientation. Because it would prevent the General Assembly or other legislative bodies from enacting or adopting certain new laws and bar the executive department and its agencies from enforcing existing laws, Amendment 2 effectively denies the right to petition or participate in the political process by voiding, *ab initio*, redress from discrimination. Like the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is meaningless if by law government is powerless to act.

IV

Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the *Slaughter-House Cases*, and, unfortunately, have instead built upon the Equal Protection Clause and Due Process Clause. The Equal Protection Clause, burdened by a history and analysis beyond this context,[10] is not the most appropriate of the Fourteenth Amendment

of Democracy in American Constitutional Argument: Voting Rights, 41 Fla. L. Rev. 443, 459 n. 63 (1989).

[10]Historically, the Equal Protection Clause was called upon to protect insular minorities. Similarities undoubtedly exist between unlawful discrimination based on sexual orientation and that based on race or national

provisions for securing the right to participate equally in the political process and yet it is the primary mode of analysis relied upon by the majority in this case.[11]

Certainly all must now agree that the Fourteenth Amendment sought to protect citizens from oppression by state government. The Equal Protection Clause of that amendment mandates that rights afforded to some are granted equally to all. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991). From time to time the acts of government intervene in the lives of its citizens. [12] Under the Equal Protection Doctrine, such government intervention is subjected to review, applying at least one of three standards: strict scrutiny, intermediate review, or rational basis analysis. The applicable standard of review to be applied depends upon the characteristics or

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origin. However, the record is uncertain as to whether, as a general matter, victims of discrimination based on sexual orientation share the same history or are subjected to a similar experience or condition as victims of racial or ethnic discrimination.

[11]The defendants argue that the participation in the political process plaintiffs seek is a particular end or the successful adoption of plaintiffs' views. I note, however, that the right to participate in the political process does not guarantee plaintiffs or any other qualified electors the success of any candidate or cause nor the state's embracement of particular ideas. This right simply guarantees access to the political process. Citizens may vote, petition or amend as a matter of right, but they cannot necessarily win as a matter of right.

Moreover, I am not unmindful that the state may deny the right to vote or participate in the political process as an operation of due process. *See, e.g., Moran v. Carlstrom*, 775 P.2d 1176, 1179 (Colo. 1989) (the General Assembly may place reasonable restrictions on the right to vote); *see also People v. Russo*, 713 P.2d 356, 360 (Colo. 1986) (jurors disqualified if they do not have the right to vote by reason of criminal conviction).

[12]Government intervention may take the form of agency action, legislation, constitutional amendment, or other conduct which has the effect of law.

attributes of the citizens involved. Under the Equal Protection Doctrine, when such governmental intervention occurs, such as with the enactment of Amendment 2 in this case, regardless of the standard applied, it is contemplated that certain abridgements of even fundamental rights are acceptable. For example, under the strict scrutiny test, the most exacting standard and that applied by the majority, state action is "constitutionally permissible [] if it is '*necessary* to promote a *compelling* state interest,' and [the state] does so in the least restrictive manner possible." Maj. op. at 10 (citations omitted) (emphasis in original).

Unlike the Equal Protection Clause, the Privileges or Immunities Clause guarantees citizens that certain fundamental rights of national citizenship are inviolate, absent due process.[13] The syntax of the Fourteenth Amendment Clause seems inescapably that of substantive entitlement. According to Ely, "the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements." Ely at 24. The importance of the Privileges or Immunities Clause is that it does not require varying standards of review and that its protections are extended to *every* citizen.

V

Under Amendment 2, the rights of citizens "peaceably to assemble and petition the government for a redress of grievances" so as to participate freely and equally in the political process are compromised in a manner prohibited by the Fourteenth Amendment. Because these political rights are fundamental and inherent in national citizenship they are protected by the Privileges or Immunities Clause. Accordingly, I concur.

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[13]*See supra*, n.11.

Evans v. Romer, No. 94SA48
JUSTICE ERICKSON dissenting:

I respectfully dissent. In *Evans v. Romer*, 854 P.2d 1270 (Colo.) (*Evans I*), *cert. denied*, 114 S. Ct. 419 (1993), the majority crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent--the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals.

In establishing what is essentially a new substantive due process right disguised as a previously unrecognized "fundamental right," the majority disregarded the warnings of Chief Justice Burger, who stated in his dissent to *Plyler v. Doe*, 457 U.S. 202, 244 (1982): "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example." Chief Justice Burger stated:

> Were it our business to set the Nation"s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children--including illegal aliens--of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

Id. at 242 (citations omitted).

The majority opinion has overlooked a crucial aspect of the case before us: we are not evaluating an act of the legislature or pronouncement of the executive--we are reviewing a constitutional amendment adopted by the people of the State of Colorado. While there are certainly some initiated constitutional amendments that a majority of the electorate may attempt to visit on a minority that will not pass constitutional scrutiny, we must not ignore the fact that we are reviewing the expressed will of the citizens of this state.

In *Evans I*, we remanded the case to the district court to determine whether the preliminary injunction sustained by a majority of this court should be made permanent. The district court, following *Evans I* with great precision, made extensive findings and made the preliminary injunction permanent. Nevertheless, people of homosexual, lesbian, or bisexual orientation have never been adjudicated to be a protected class and the right to participate equally in the political process has never been determined, apart from *Evans I*, to be a fundamental right. Accordingly, I would employ a rational relation standard to Amendment 2 and vacate the permanent injunction. For the reasons set forth in my dissent to *Evans I*, and for the reasons set forth below, I respectfully dissent.

I

The majority relies on *Evans I* and applies the strict scrutiny standard of review to Amendment 2 because it holds that the Equal Protection Clause of the United States Constitution guarantees the fundamental right to participate equally in the political process. Maj. op. at 4; *Evans I*, 854 P.2d at 1276. *Evans I* established this standard of review by assembling several United States Supreme Court decisions and interpreting their collective teachings as implying a new fundamental right. *See Evans I*, 854 P.2d at 1276 (citing voting cases, ballot access cases, and "cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes"). In my view, no fundamental right or suspect class is implicated by Amendment 2, and therefore the standard of judicial scrutiny applied by the majority is erroneous.

A

The majority in *Evans I* extensively reviewed many United States Supreme Court decisions to reach its conclusion, and emphasized a line of cases relating to citizen participation in the political process. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969). The majority in *Evans I* interpreted these cases to create the fundamental right to participate equally in the political process. Properly understood, however, these cases involve suspect

classifications and not the alleged fundamental right to participate equally in the political process.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the United States Supreme Court addressed a violation of the Equal Protection Clause of the federal constitution. *Hunter* involved a city charter amendment that repealed a racial anti-discrimination ordinance and required voter action before such an ordinance could be enacted. *Id.* at 387. Although *Hunter* involved the political process, the Court invalidated the amendment because it created an unjustified distinction *based on race*. The Court held:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

Id. at 391-92 (citations omitted). Courts and scholars reviewing *Hunter* have recognized that the holding was predicated on an unconstitutional racial classification. *See Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975) (stating that *Hunter* struck down an amendment that was based on a racial classification), *cert. denied*, 426 U.S. 940 (1976); *Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."), *aff'd*, 402 U.S. 935 (1971); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4 Dist. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314 (1991) (noting that in place of a political process theory of equal protection review, racial classifications are and should be considered presumptively unconstitutional because they should be irrelevant to decision-making); Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (suggesting that the decision in *Hunter* is based on racial classifications).

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court applied *Hunter* and struck down a state-wide initiative to terminate the use of busing to achieve racial integration in the public schools. In finding that the initiative violated the Equal Protection Clause, the Supreme Court held:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (emphasis in original) (citations omitted). The Court thus did not approve of "distinctions based on race" and struck down the initiative because it would have created additional burdens for a class of citizens who have had historical difficulty in changing the political process. *Id.* at 486. *See Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 563-65 (1990) (holding that members of a traditionally suspect class merit special protection); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (same); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that special protection may be offered for "discrete and insular" minority groups).

A similar issue was addressed in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which was announced on the same day as *Washington*. In *Crawford*, the Court upheld a state constitutional amendment that prohibited state courts from ordering mandatory student assignment or transportation. The Court stated that if the constitutional amendment employed a racial classification such as the classification in *Hunter*, the Court would apply the strict scrutiny standard of review, but found *Hunter* inapplicable because the amendment at issue did not "embody a racial classification." *Crawford*, 458 U.S. at 536-37.

The fact that the fundamental right created by the majority in *Evans I* has never been recognized by the Supreme Court is evident in two cases, *James v. Valtierra,* 402 U.S. 137 (1971), and *Gordon v. Lance,* 403 U.S. 1 (1971). In *James* and *Gordon,* the Court could have used the fundamental right found in *Evans I* and applied strict scrutiny review to strike down constitutional measures. Instead, in both cases, the Court upheld the provisions and refused to apply the strict scrutiny standard enunciated in *Hunter.*

In *James,* the Supreme Court upheld the validity of a California constitutional measure that prohibited state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved of the project in a referendum. Thus, the citizens singled out in *James* were low-income people who would qualify for low-rent housing and therefore the Court did not apply strict scrutiny. The Supreme Court said:

> Unlike the case before us, *Hunter* rested on the conclusion that Akron"s referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California"s Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter,* and this we decline to do.

James, 402 U.S. at 140-41.

Similarly, in *Gordon,* the plaintiffs challenged West Virginia's constitutional provision that required a sixty-percent approval for any bonded indebtedness incurred by the political subdivisions of the state. As in *James,* the Supreme Court did not apply the strict scrutiny standard of review because:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. . . . We are not, therefore, presented with a case like *Hunter,* . . . in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear--"those who would benefit from laws barring racial, religious, or ancestral discriminations."

Gordon, 403 U.S. at 5. *James* and *Gordon* demonstrate that strict scrutiny should not be applied to review a restriction on the political process unless the restriction singles out a discrete and insular minority.[1] The Supreme Court of the United States has never held, however, that the right to participate equally in the political process is a fundamental right.

B

The development of fundamental rights in our jurisprudence has never been a matter for ad hoc determination. *See Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (stating that fundamental rights are those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed"); *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (noting that fundamental rights are liberties that are "deeply rooted in this Nation's history and tradition"); *see also Bowers v. Hardwick,* 478 U.S 186, 191-92 (1986); *Griswold v. Connecticut,* 381 U.S. 479, 481-86 (1965). Fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973). Among the fundamental rights delineated by the Supreme Court are the right to vote, the right to interstate travel, the right to privacy, and the guarantees contained in the First Amendment. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 101 (1972) (First Amendment); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969) (interstate travel); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 670 (1966) (voting); *Griswold,* 381 U.S. at 484 (privacy).

The Court has been reluctant to recognize new rights as fundamental. *See Bowers,* 478 U.S. at 195 ("There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses], particularly if it requires redefining the category of rights deemed to be fundamental."); Geoffrey Stone, et al.,

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[1]Homosexuals, lesbians, and bisexuals have never been adjudicated to be a discrete and insular minority by the Supreme Court. *See High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 571 (9th Cir. 1990); *Dahl v. Secretary of the United States Navy,* 830 F. Supp 1319, 1323-25 (E.D. Cal. 1993).

Constitutional Law, at 831 (1986) (stating that the Court "has essentially frozen the list of 'fundamental' interests"). The Court has refused to declare education, housing, the right to refuse medical treatment, welfare payments, or governmental employment to be fundamental rights worthy of heightened constitutional protection. *See Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990) (right to refuse medical treatment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (employment); *Rodriguez*, 411 U.S. at 35 (education); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (welfare). Never before has any court recognized the right to participate equally in the political process as a fundamental right, the curtailing of which warrants strict judicial scrutiny.[2] "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 397 U.S. at 33.

It is crucial to note, however, that even though equal participation in the political process does not merit strict scrutiny analysis, the United States Constitution offers protection for those who may be adversely affected by legislation. When individuals or groups are singled out, as they have been here, they may still be protected by the Due Process Clauses or the Equal Protection Clause.[3] In this case, the class of citizens is protected by the Equal Protection Clause. Accordingly, Amendment 2 must be struck down only if its challengers can demonstrate that the legislation is not rationally related to a legitimate state interest.

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[2]Recently, however, a federal district judge, relying on *Evans I*, struck down an anti-gay-rights measure approved by Cincinnati voters. In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, slip op. at 26 (S.D. Ohio Aug. 9, 1994), the federal district court declared that a City Charter Amendment was unconstitutionally vague and violated the First Amendment right of homosexuals to participate in the political process. See also *Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

[3]When fundamental rights are denied to everyone, it raises due process concerns. When fundamental rights are denied to some individuals only, it raises equal protection concerns. The applicable standard in either case, however, is strict scrutiny.

II

During oral argument before this court, counsel for the plaintiffs-appellees asserted that even if strict scrutiny review were inappropriate, we should analyze Amendment 2 under a rational basis standard of review. Counsel noted that in *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993), the Supreme Court did not engage in strict scrutiny review because it was not properly preserved at the lower levels and therefore urged this court not to preclude rational basis review by ruling merely under strict scrutiny standards. I find counsel's contention persuasive and therefore address Amendment 2 under a rational relation standard.

A

In reviewing an act of the legislature or a voter-mandated constitutional amendment that creates a classification involving neither a fundamental right nor suspect classes, a court will review the classification under the "rational basis" standard of review. *See Heller*, 113 S. Ct. at 2642; *Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 462 (1988). Under the rational basis standard of review, the classification will be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communication, Inc.*, 113 S. Ct. 2096, 2101 (1993); *see also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Dandridge*, 397 U.S. at 484-85. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 113 S. Ct. at 2642; *see also Nordlinger v. Hahn*, 112 S. Ct. 2326, 2331-32 (1992).

The inquiry into whether there is a rational basis for the classification, however, does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). Instead, a classification that involves neither suspect classes nor fundamental rights is accorded a strong presumption of validity. *Beach Communication*, 113 S. Ct. at 2098; *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981); *Murgia*, 427 U.S. at 314.

Because of the strong presumption of validity, the purpose or rationale behind the legislation need not be articulated at any time. *Heller*, 113 S. Ct. at 2642; *Nordlinger*, 112 S. Ct. at 2334; *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). Additionally, the party challenging the classification bears the burden of "negat[ing] every conceivable basis which might support it" whether or not it is supported by the record. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *see also Heller*, 113 S. Ct. at 2643.

In an effort to ensure that rational basis review does not become a "license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach Communication*, 113 S. Ct. at 2101, the reasons articulated are given great deference. *See Id.* at 2098 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) ("In cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'") (citation omitted); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 62 (1973) ("The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional."); *Dandridge*, 397 U.S. at 485 (noting that a classification does not fail because "in practice it results in some inequality") (citation omitted); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific."); *see also* Laurence Tribe, *American Constitutional Law* 1440 (2d ed. 1988) ("Within very broad limits, courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally."); John Nowak, Ronald Rotunda, Nelson Young, *Constitutional Law* 596 (2d ed. 1983) ("A majority of the justices today will uphold governmental classifications under this standard unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 Temp. L. Rev. 937,

941 (1991) ("The rational basis test is notoriously weak. When applied, there is 'little doubt about the outcome; the challenged legislation is always upheld.'") (quoting *Murgia*, 427 U.S. at 319 (Marshall, J. dissenting)); *but see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (striking down on rational basis review a zoning law that prohibited mentally retarded individuals from residing in certain areas of town because the law was based on the "bare . . . desire to harm a politically unpopular group") (citation omitted). This is so because:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance, 440 U.S. at 97 (footnote omitted). Although the purposes and rationale of a voter initiative are even more difficult to assess than legislative pronouncements, initiatives passed by the citizens of the state which contain classifications not related to fundamental rights or suspect classes are also given deference. *See Gregory*, 501 U.S. at 470 (applying the rational basis standard to a constitutional restriction enacted by the people); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (applying a rational basis test to measures adopted through a referendum).

It is the prerogative of the people of the State of Colorado, and not this or any other court, to weigh the evidence and determine the wisdom and utility of the purposes behind a measure adopted through the initiative process. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (stating that the Minnesota Supreme Court erred in substituting its judgment for that of the legislature). Thus, whether in fact Amendment 2 will meet its objectives is not the relevant question: the Equal Protection Clause is satisfied if the people of Colorado could have rationally decided that prohibiting homosexuals, lesbians, and bisexuals from enacting certain legislation

might further a legitimate interest. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984); *Clover Leaf Creamery*, 449 U.S. at 466.

Amendment 2 was put to a plebiscite by initiative petitions and eventually won voter approval by 813,966 votes to 710,151 votes. Because Amendment 2 was a product of a vote of the citizens of Colorado, no purpose or rationale for Amendment 2 was explicitly set forth. *See MSM Farms*, 927 F.2d at 332 ("Because the law was adopted through the initiative and referendum process, there is little traditional legislative history regarding its purpose."). However, the state has articulated several rationale in this court and in the district court to establish that the interest behind Amendment 2 is not only a rational interest but also a compelling state interest.[4]

III

Although only one legitimate state interest rationally related to the state's goals for a constitutional amendment is necessary, the state has set forth several. The district court found that two rationale--the promotion of religious freedom and the promotion of family privacy--demonstrated compelling state interests, although it found that the means for achieving the interests were not narrowly tailored to achieve the objectives.[5] In my view, there are at least three

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[4]The district court found that the state alleged six compelling state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial and religious privacy; (5) preventing the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of children.

[5]The district court applied the strict scrutiny standard of review which requires the state to prove that classifications affecting fundamental rights were necessary to promote a compelling or overriding interest which is narrowly tailored. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982) (noting that the classification must be "precisely tailored"); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (stating a classification involving a fundamental right must be a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 634

interests that satisfy the constitutional standard and those asserting the invalidity of Amendment 2 have not met their burden of demonstrating that there is no rational basis for the constitutional amendment.

A

The state asserts that the rational basis of Amendment 2 is that it prevents the government from interfering with religious privacy. The root of the state's contention is that under ordinances preempted by Amendment 2, individual landlords or employers, including churches, who have profound religious objections to homosexuality, would nonetheless be compelled to compromise those convictions under threat of government sanctions. Thus, Amendment 2 prevents any political body from enacting legislation that would hinder the right of individuals to choose who to rent to or who to employ on religious grounds. The district court found that "[p]reserving religious freedom is a compelling state interest" but that Amendment 2 was "not narrowly drawn to achieve that purpose in the least restrictive manner possible."

Freedom of individuals to practice and hold particular religious beliefs is among the highest values in our society. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943); *Jones v. Opelika*, 319 U.S. 103, 104 (1943); *see also Martin v Struthers*, 319 U.S. 141, 149-50 (1943) (Murphy, J., concurring). It is not within the discretion of this or any court to determine which beliefs are valid because "courts are not the arbiters of scriptural interpretation." *United States v. Lee*, 455 U.S. 252, 257 (1982). In fact, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). Not only is it impermissible for courts to determine the validity of religious practices and beliefs, but no government official or body may delineate what is a "proper" form of faith and require citizens to act in accordance with government-mandated religious standards. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any

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(1969) (noting that there needed to be a compelling reason for the government to restrict interstate travel).

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein.").

Nevertheless, not all burdens on religion are unconstitutional. *Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 718 (stating that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion"). Even the highest values, including religious freedom, must sometimes give way to the greater public good. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Thus, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990).

In this case, the state asserts that Amendment 2 is an attempt to protect religious freedom by precluding legislation that would threaten sanctions against those who would refuse to employ or rent to homosexuals, lesbians, and bisexuals. The state indicates several examples of instances in which individuals or groups were forced to set aside their religious beliefs based on legislative enactments protecting homosexuals. In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

In my view, the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest.

B

Although the district court found that the state did not have a compelling interest in deterring "factionalism," or "political fragmentation," the state does have a legitimate interest in promoting

state-wide uniformity and Amendment 2 is rationally related to that interest.

Prohibiting local action on matters affecting the entire state is advantageous inasmuch as the state has an interest in uniformity of regulation:

> The central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If there is no need for statewide uniformity, there is no need for state law to preempt local power to regulate. . . This is the core of the preemption question--to consider, on the one hand, the need for statewide uniformity of regulation of a specific type of conduct, and, on the other hand, the need of local governments to be able to respond to local, as distinguished from statewide problems.

Daniel R. Mandelker & Dawn C. Netsch, *State and Local Government in a Federal System* 237 (1977); *see also* Osborne M. Reynolds, *Local Government Law* 120 (1982) (stating that the critical inquiry in the context of state preemption of local law is: "[I]s this an area where it is desirable to have a single, all-encompassing scheme of regulation, so that local laws--not just local laws that conflict with the state's, but *any* local laws--would unduly complicate the picture?"); Charles S. Rhyne, *The Law of Local Government Operations* § 19.11 (recognizing that preemption is rooted in the necessity of statewide uniformity of regulation).

In determining what is a matter of statewide concern, this court has not set forth a strict legal standard. Instead, we have determined the nature of the concern on an ad hoc basis. *See Denver & Rio Grande Western R.R. Co. v. City & County of Denver*, 673 P.2d 354, 358 (Colo. 1983). In *City & County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990), we stated:

> Although we have found it useful to employ the "local," "mixed," and "state-wide" categories in resolving conflicts between local and state legislation, these legal categories should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments. Those affairs which

> are municipal, mixed or of statewide concern often imperceptibly merge.

State regulation is a matter of statewide concern in a broad variety of contexts. *See Robertson v. City & County of D nver*, 874 P.2d 325, 350 (Colo. 1994) (Erickson, J., dissenting).

In this case, the state has a legitimate interest in promoting Amendment 2 because it is a matter of statewide concern. Amendment 2 involves a matter of statewide concern because the public is deeply divided over the issue of homosexuality.[6] In fact, civil rights has never been the type of concern reserved exclusively for local governments.[7] By adopting Amendment 2, the people of the state have sought to ensure that the government will act on a uniform basis. Several local governments, such as Denver, Aspen, and Boulder enacted sexual orientation laws, while others did not. By voting to approve Amendment 2, the voters of Colorado indicated that they wanted a statewide resolution of the issue that had formerly only been locally regulated and subject to great debate. The citizens of the state have a right to the initiative process which resolves conflicts between municipal and local governments when the issue is a matter of statewide concern and the process is not repugnant to the constitution.[8] The Supreme Court has noted that "referendums

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[6]The issue of homosexuality and bisexuality is deeply controversial and divisive. Unlike race and sex, there is no national consensus that sexual orientation is an inappropriate basis for governmental, much less private, decisionmaking. A series of constitutional amendments and acts of Congress have authoritatively settled the place of race and sex in American life. The same simply cannot be said of non-traditional sexual orientation.

[7]For example, in 1989, the General Assembly passed a law prohibiting insurance companies from inquiring about or making coverage decisions on the basis of sexual orientation. *See* § 10-3-1104(1)(f), 4A C.R.S. (1993 Supp.). In 1992, the Colorado Civil Rights Commission went on record recommending legislation adding sexual orientation to the list of protected classes.

[8]Testimony of Harvard Government Professor Harvey Mansfield indicated that the use of the initiative process to enact Amendment 2 supported stability and respect for the political process, by giving "the people

demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[9] *James*, 402 U.S. at 141.

In my view, the state has a legitimate interest in promoting statewide uniformity in matters of statewide concern and Amendment 2 bears a rational relationship to that interest.

C

The state also contends that it has a legitimate interest in allocating its resources. Specifically, the state suggests that laws prohibited by Amendment 2 would drain the state's financial and labor resources set aside and budgeted for the protection of traditionally suspect classes and diminish respect for traditional civil rights categories.

In this case, the testimony reflected that, although there was no current statute that required the state to enforce civil rights legislation on behalf of homosexuals, lesbians, and bisexuals, any such statute would decrease the funding available to enforce existing laws

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a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment."

[9]The Court in *James* went on to cogently state:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

James v. Valtierra, 402 U.S. 137, 142 (1971).

protecting traditionally suspect classes.[10] For example, the investigative arm of the Civil Rights Commission has experienced steadily increasing demands upon a shrinking budget. Two out of the last three years, the Division has been unable to fulfill its part of a federally funded work-share agreement.[11] The Division received complaints from the black community that claims were not being thoroughly investigated and prosecuted. The state, therefore, reasonably postulates that a law requiring the protection of an additional group would further stretch scarce resources, and Amendment 2 protects the civil rights enforcement for traditionally suspect groups.[12] Thus, the decision of the people of the State of Colorado to allocate government resources in a particular manner is

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[10]In *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), the Supreme Court announced its standard for reviewing legislative enactments in the economic sphere:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

[11]Under the agreement, the Division works on a certain number of cases involving only federally-protected classes which, of course, does not include sexual orientation. The Division only met the goals last year because the Equal Employment Opportunities Commission reduced the number of cases necessary to satisfy the agreement.

[12]The United States Supreme Court has addressed the issue of fiscal concerns impacting certain rights. In *Plyler*, 457 U.S. at 222-24, the Court held that whatever savings might be achieved by the state by denying public education to undocumented aliens were insubstantial compared to the costs to the children, the state, and the nation of not educating them. In *Shapiro*, 394 U.S. at 618, and in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court found fiscal integrity not to be a compelling interest balanced against the right to interstate travel and the right to welfare assistance to aliens. These cases are distinguishable as either fundamental rights cases or cases in which the object was saving money not a basic allocation of funds.

a legitimate state interest in this case. *See Dukes*, 427 U.S. at 303 (upholding a New Orleans ordinance noting that states have wide latitude in regulating their local economies); *James*, 402 U.S. at 143 (noting that a referendum procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds" and therefore found that a referendum measure did not violate the Equal Protection Clause).

Additionally, the state has a legitimate interest in ensuring that the traditionally suspect classes remain respected. *See Crawford*, 458 U.S. at 539 ("And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities."). Professor Joseph Broadus testified that the addition of homosexuals to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. Testimony also indicated that, unlike the traditionally suspect classes, homosexuals, lesbians, and bisexuals are a relatively politically powerful and privileged special interest group. Indeed, former Civil Rights Commission Chairman Ignacio Rodriguez testified that the inclusion of homosexuals as a suspect class would represent a "drastic departure" from the historical aims of the civil rights laws.

The State of Colorado, through entities such as the Colorado Civil Rights Division, has attempted to further the interest in remedying specific instances of sexual and racial discrimination through existing civil rights laws and enforcement programs. However, owing to the fiscal constraints which are inevitably a part of public administration, unlimited funds are not available for this purpose. Therefore, it is incumbent upon the state to set priorities for its enforcement efforts. In this case, the setting of priorities is a legitimate state interest and Amendment 2 is rationally related to that interest.

IV

In my view, the correct standard of judicial review of Amendment 2 is a rational basis standard of review. Additionally, the plaintiffs have not shown that Amendment 2 is not rationally related to the state's legitimate interest in protecting religious freedom, encouraging statewide uniformity in the law, and allocating resources.

Accordingly, I would reverse the decision of the district court and vacate the injunction. Therefore, I dissent.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92 CV 7223, Courtroom 19

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

INTRODUCTION

On November 3, 1993, by a vote of 53.4% to 46.6%, the voters of the State of Colorado passed an initiated amendment to the Colorado Constitution referred to as Amendment 2. That amendment provides:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Nine days after the amendment was passed, plaintiffs, individuals, three home rule cities, and a school district, filed the instant action seeking to have Amendment 2 declared unconstitutional. Plaintiffs also sought and obtained a preliminary injunction prohibiting the amendment from becoming effective prior to court review. That injunction was upheld by the Colorado Supreme Court July 19, 1993 in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

In its ruling, the Colorado Supreme Court did more than merely affirm the granting of the preliminary injunction. By the terms of its ruling that court set the guidelines this court must apply in making its present decision. Certain parts of the Supreme Court opinion must be noted for they form the basis for the present ruling. The Colorado Supreme Court held:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny. (Footnote omitted)

Evans, 854 P.2d at 1282.

Further, the Supreme Court ruled:

> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801,808, 9L.Ed.2d 821 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627, 89 S.Ct. at 1889. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from

> participating equally in the political process. (Footnote omitted)

Id. at 1285.

By stating that "strict scrutiny is required," the Supreme Court established the burden of proof at the trial.

> Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that purpose in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 102 S. Ct. 2382, 2395, 72 L.Ed. 2d 786 (1982).

Id. at 1275.

FINDING OF FACT AND CONCLUSIONS OF LAW REGARDING OFFERED COMPELLING STATE INTERESTS

By virtue of the Supreme Court ruling, the burden at trial was upon defendants to show at least one compelling state interest and to show that Amendment 2 was narrowly drawn to support that interest. This is an unusual placement of the burden of proof. Defendants presented six alleged "compelling state interests": 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children. (Defendants' Trial Brief pp 3-4). The court will address each claimed compelling interest separately.

The first claimed compelling state interest is that Amendment 2 deters factionalism. In their trial brief Defendants describe what they mean by factionalism as follows:

> Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality

> does not serve to fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.

(Defendants' Trial Brief, pp 60-61.)

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism.

In support of this position defendants urge two cases, *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, (1974), and *Anderson v. Celebreeze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed. 2d 547(1983). The word "factionalism" appears in both of those cases. The word "factionalism" is not used in either *Storer* or *Anderson* in the same way as defendants here seek to use it. Additionally, neither case is even critical of "factionalism" as it is used in those cases. Finally, deterring factionalism was not the compelling state interest urged in those two cases.

Both *Storer* and *Anderson* address state rules and regulations for placing the name of independent, meaning not Republican or Democratic, candidates on election ballots. The states in each case sought to justify their regulations by urging the compelling state interest of "political stability." The ruling in each case addresses the stability of political processes for established parties and independents to place candidates names on election ballots.

In both cases it is only "splintered parties and *unrestrained* factionalism" (emphasis supplied) which is criticized by the Supreme Court. Defendants here do not seek to deter "unrestrained" factionalism. The "factionalism" which defendants here argue about found to be a great strength of the American political process in the cases cited. In *Anderson* the Supreme Court endorses that which the defendants here seek to deter:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the market place of ideas . . . . In short, the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (citation omitted) -- are served when election campaigns are not monopolized by the existing political parties.

Anderson, 460 U.S. at 794, 75 L.Ed.2d at 561.

The *Anderson* court made reference to its earlier decision in *Williams v. Rhodes*, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, (1968), another case dealing with state limitations on parties other than Republicans or Democrats in placing candidates names on election ballots, by repeating: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Anderson*, 460 U.S. at 802, 75 L.Ed.2d at 566.

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendant seek to deter those very things as being "factionalism". The history and policy of this country has been to encourage that which defendants seek to deter.

Defendants first claimed compelling state interest is *not* a compelling state interest. The *opposite* of defendants' first claimed compelling interest is most probably compelling.

Defendants' second suggested compelling state interest is the preservation of the State's political functions. Witnesses were offered who testified about the "homosexual agenda" and the homosexual push for "protected status" and urged that this Amendment protected Colorado's political functions from being overrun by such groups. These witnesses included Will Perkins, Tony Marco, and Kevin Tebedo.

Mr. Perkins identified himself as a Chrysler dealer in Colorado Springs and Chairman of the Board of Colorado for Family Values (hereafter CFV), the organization that spearheaded the campaign for

Amendment 2. He indicated that CFV intended Amendment 2 to deny protected status to homosexuals and bisexuals. Mr. Marco identified himself as a free lance writer of mixed political heritage. He testified that at one time he was a Marxist-Leninist, that he had attended a number of colleges, ultimately earning a masters degree in creative writing, that in a sense he was the founder of CFV, and that Amendment 2 was his idea. He testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone. Mr. Tebedo identified himself as the paid executive director of CFV and one of its founders. He testified that the purpose of Amendment 2 was to prevent the government from declaring that homosexuals are entitled to protected class status. He made clear his belief that absent Amendment 2, affirmative action programs for homosexuals would somehow be implemented in Colorado.

Defendants' argument as to this claimed interest was based on the Tenth Amendment to the U.S. Constitution which grants the power to amend state constitutions to the states. Defendants argue that the people through their votes have decided to amend the Colorado constitution and that vote should end the discussion.

Both this court in its ruling granting the preliminary injunction and the Supreme Court in affirming that injunction made specific reference to the constitutional provisions granting the right and power of the people of Colorado to amend their Constitution. The very first footnote in the Supreme Court opinion reads:

> [1]Art. II, §1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, §2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, *provided, such change be not repugnant to the constitution of the United States.*" (Emphasis supplied)

Evans, 854 P.2d at 1272.

Also, the very last section of the majority opinion the Supreme Court once again acknowledged the significance of the election, *but* put that election in perspective:

> That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that is be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632 (1964).

Evans, at 1286.

The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' argument seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes. This claim is basically that there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 1 passed in the same election.

Mr. Thomas Duran, formerly of the Colorado City Rights Division, and Mr. Ignacio Rodriguez, formerly of the Colorado Civil Rights Commission, were both called to testify that without Amendment 2 there would be a dilution of protections afforded to existing suspect classes. This testimony was unclear because the absence of this amendment does not mean that gays have been added as a protected class to any statute. Similarly, Professor Joseph Broadus from the George Mason University School of Law testified that in his view the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. He further testified that enforcement of civil rights protections for gays could result in a dilution of governmental resources allocated to protect those traditional civil rights.

Contrasted against this testimony was the testimony of Denver Mayor Wellington Webb and Brenda Tolliver-Locke, a Compliance officer charged with enforcing the Denver Anti-discrimination ordinance. Both testified that enforcing Denver's ordinance, which does not contain a sexual orientation provision, does not detract from enforcing other aspects of the same ordinance. The inclusion of sexual orientation in the Denver ordinance has not necessitated an increase of enforcement staff nor has it resulted in an increase in costs.

Plaintiffs also presented the testimony of Leanna Ware from the Civil Right Bureau of the State of Wisconsin. In 1982 Wisconsin became the first state to enact statutory prohibitions against discrimination based on sexual orientation. Ms. Ware testified that the sexual orientation cases under those Wisconsin statutes are a very small percentage of the total case load and have not limited enforcement of other parts of the Wisconsin statutes in any way.

The facts don't support defendants' position. Defendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinance.

Additionally, the Court has a very real question as to whether fiscal concerns may rise to the level of a compelling interest. At least three U.S. Supreme Court cases have suggested that fiscal concerns do *not* reach such a level when weighed against fundamental or even less than fundamental rights. In *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d 786 (1982), the court was faced with an issue relating to public education of the children of undocumented aliens. The court in that case found that public education is *not* a fundamental right and that undocumented aliens were *not* a suspect class. Having made these two findings, the court nonetheless found that whatever savings might be achieved by the state denying public education to these undocumented aliens were insubstantial in the light of the costs to the children, the state, and the nation of not educating them. The other two cases which found fiscal integrity *not* to be a compelling interest balanced fiscal integrity with the right of interstate travel and right to welfare assistance to aliens. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969), and *Graham v. Richardson*, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971).

The Colorado Supreme Court has found the right invaded in this case to be fundamental, and this court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.

Defendants' fourth alleged compelling interest is the prevention of governmental interference with personal, familial and religious privacy. Pastor Hasford Van of Boulder's Second Baptist Church testified about the possible impact of Boulder's ordinance on his church in view of the fact that there is no religious exception under that ordinance. By affidavit of John Gillespie, executive director of Rawhide Boys Ranch, New London, Wisconsin, defendants presented the experience of his institution under the Wisconsin statutes, especially as it related to employment of homosexuals. Personal privacy was addressed, at least tangentially, by several witnesses.

Preserving religious freedom is a compelling state interest. Religious freedom is protected by the First Amendment to the United States Constitution and by Article II, Section 4 of the Colorado Constitution. The ordinances from Aspen and Denver, have exceptions for religious beliefs. The issue of protecting religious freedom in the context of competing governmental interests has been discussed by the U.S. Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S.Ct. 2017

(1983). The question in that case was whether non-profit private schools with racially discriminatory admission standards based on religious doctrine qualified as tax exempt organizations under the tax code. The Supreme Court concluded that private schools which employed such discriminatory policies were not tax exempt organizations. Recognizing the clash of interests and the impact of denying tax exempt status the Court held as follows:

> Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.
>
> The governmental interest at stake here is compelling. As discussed in Part II-B, supra, the Government has a fundamental overriding interest in eradicating racial discrimination in education (Footnote omitted) – discrimination that prevailed, with official approval, for the first 165 years of this Nation's Constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

Bob Jones University, 461 U.S. at 603-604, 76 L. Ed. 2d, at 181.

In the present case, the religious belief urged by defendants is that homosexuals are condemned by scripture and therefore discrimination based on that religious teaching is protected within freedom of religion. In *Bob Jones University*, religious teaching was the basis for racial discrimination. The competing interest in the present case is the right to participate in the political process as outlined by the Colorado Supreme Court. On balance, this court concludes that the two rights, the religious right to discriminate and the homosexuals' right to participate in political process can coexist.

When the court finds that the defendants have presented a compelling state interest, the court is then charged with determining whether Amendment 2 is "narrowly drawn to achieve that interest in the least restrictive manner possible." *Evans* at 1275. In this case it is obvious that the amendment is not narrowly drawn to protect religious freedom. The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is

found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process. The court specifically finds that Amendment 2 is not narrowly drawn to accomplish the purpose of protecting religious freedom.

Several witnesses testified on the issue of family privacy. In addition to Messrs. Tebedo, Perkins and Marco, Mr. Robert Knight, Director of Cultural Studies of the Family Research Council, was called to testify about family privacy. He testified that the Family Research Council is a pro-family lobbying organization and he admitted he is an opponent of the gay rights movement. He also testified that a part of his job is to be interviewed by the media and to debate gay and lesbian leaders. His testimony was that gay rights advocates are seeking to destroy the family by, in part, seeking to remove special societal protections from the family. He opined that the media is pro gay and advised the court of what was being discussed on afternoon television talk shows.

The court would have to assume or speculate what the family is, according to Mr. Knight. He never defined the family, nor was he asked to provide a definition. If the Court assumes the family consists of a mother and father who are married and living together, and children from that marriage who live with their parents, more questions are raised than are answered. Does the family include parents who are divorced? Does it include a family where the parents are divorced and remarried? Does it include single parent families, or families created by second marriages with stepparents and stepchildren?

Most importantly, however, how does Amendment 2, which impacts on fundamental rights of an identifiable group, narrowly promote the goal of promoting family values? Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group. The tie-in between the interest of protecting the family and denying gays and bisexuals the right to political participation was not made by defendants' presentation.

Defendants failed to meet their burden as to the second prong of their claimed fourth compelling interest, showing that this

Amendment is narrowly drawn to achieve its purpose of protecting religious freedom or family privacy.

The general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right. Defendants have not carried their burden as to this alleged "compelling state interest."

Defendants' fifth compelling interest is the prevention of government from subsidizing the political objectives of a special interest group. Their strongest argument on this claim was:

> For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology. (Defendants' Trial Brief p. 69).

No authority is offered for this fairly remarkable conclusion, and none has been found. Further, the logic of the argument is unclear. This claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest.

The final interest urged is the promotion of the physical and psychological well-being of children. The defendants argue:

> The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass. (Defendants' Trial Brief p. 74)

If the compelling interest relates to protecting children physically from pedophiles, the testimony of plaintiffs' witness Dr. Carole Jenny is more persuasive than anything presented by defendants. Dr. Jenny practices at Denver's Children's Hospital and made a study of persons who sexually abused children who were brought to that hospital. She indicated that pedophiles are predominantly heterosexuals not homosexuals. If the compelling interest is in protecting the psychological well being of homosexual youth, the Court is unable to

discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare. Defendants have failed to present sufficient evidence to support this claimed compelling interest.

The defendants have presented evidence of only two compelling state interest that Amendment 2 serves, the promotion of religious freedom and the promotion of family privacy. As to those two interests the Amendment is not "narrowly drawn to achieve that purpose in the least restrictive manner possible." Defendants have failed to carry the burden assigned to them by the Colorado Supreme Court and therefore this Court concludes that Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest.

Plaintiffs' Claim of Suspect or Quasi-Suspect Class

The above ruling, however, is not the end of the matter. In one of their trial briefs plaintiffs admit that "if the defendants do not meet their burden of showing that Amendment 2 serves a compelling interest by the least restrictive means, then Amendment 2 must be held unconstitutional . . . ." (Plaintiffs' Trial Memorandum on Legal Standards for Determining Whether Amendment 2 Serves a Compelling State Interest Through The Least Restrictive Means, Footnote 1, p. 2). Notwithstanding the fact that the court has not ruled as plaintiffs suggest, they nonetheless seek to have the court rule on three additional matters. First they claim that homosexuals and bisexuals ought to be found to be a suspect class and entitled to strict scrutiny review for that reason. Second they claim that homosexuals and bisexuals ought to be found to be a quasi-suspect class and be entitled to heightened scrutiny review. Finally they claim that Amendment 2, even if subject to the least stringent standard of review, the rational basis review, ought to be found unconstitutional.

Plaintiffs' presentation seeking suspect class status may be new or a change of plaintiffs' initial position. The Supreme Court was unaware that plaintiffs were seeking suspect class status. That court noted, "That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, (citations omitted) and that *plaintiffs do not*

claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them." (Emphasis supplied). *Evans* at 1275.

Additionally, the question of whether plaintiffs had pled a claim of suspect or quasi-suspect class in a manner sufficient to place defendants on notice of those claims was the subject of a motion *in limine*. This Court ultimately denied the motion which sought to exclude evidence relating to the question of suspect of quasi-suspect class, and the Court will address those issues in this ruling.

Plaintiffs urge that this Court should find that the elements associated with a suspect class are present in the homosexual and bisexual community. Plaintiffs argue that those elements are: (1) common traits; (2) a history of discrimination; (3) especially vulnerable in society, and that; (4) the common trait is irrelevant to individual merit. This set of elements is a re-definition or amalgamation of elements from other cases. No case cited contains these four elements. In order to persuade the court, plaintiffs filled the witness stand with doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists. Having chosen to present these types of witnesses, defendants felt obliged to respond in kind.

Standards for determining whether a group may be considered a "suspect" or "quasi-suspect" class have been discussed in various opinion.

> To be a "suspect" or "quasi-suspect" class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right. *Bowen v. Gilliard*, 483 U.S. 587, 602-603, 107 S.Ct. 3008, 3018, 97 L.Ed. 2d 485 (1987)

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School District v. Rodriguez, 411 U.S. 1, 28, 36 L.Ed.2d 16, 41, 93 S.Ct. 1278 (1973) (same language quoted with approval in *Massachusetts Board of Retirement v. Murgia*, 427 U.S 307, 313, 49 L.Ed.2d 520, 525, 96 S.Ct. 2562).

In applying these standards to homosexuals and bisexuals, no appellate court has yet found them to be either a "suspect" or quasi-suspect" class. *Ben-Shalom v. March*, 881 F.2d 454 (7th Cir. 1989) (attempted re-enlistment in military by lesbian); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (secret and top-secret security clearances for homosexuals); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (Homosexuals seeking to be hired by the FBI); *Bowers v. Hardwick*, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) (attack on constitutionality of the Georgia sodomy statute by homosexuals). *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (release of homosexual member of Navy reserve from active duty). It also bears noting that to date the Supreme Court has only recognized three classifications as suspect and two as quasi-suspect.

> However, the Supreme court has recognized only three classifications as suspect: race, *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), alienage, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971); *but see Ambach v. Norwick*, 441 U.S. 68, 72-75, 99 S.Ct. 1589, 1592-93, 60 L.Ed.2d 49 (1979), and national origin, *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); and two others as quasi-suspect: gender, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S.Ct. 3331, 3335-36, 73 L.Ed.2d 1090 (1982), and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

Padula, at 102.

Plaintiffs called Dr. Richard Green, a psychiatrist specializing in human sexuality, Dr. Marcus Conant, a Board Certified Dermatologist whose practice consists mainly of treating AIDS patients in San Francisco, and Dr. Dean Hamer, a molecular biologist and genetic explorer, each of whom testified from the perspective of his discipline that homosexuals have certain common traits. Dr. Ted Marmor, an expert in psychiatry testified as to his opinion that homosexuality has no single cause but that there is probably some genetic cause and some early environmental, sociological cause. They called Professor Burke Marshall a law professor from Yale who was centrally involved in drafting Title VII of the 1964 Civil Rights Act, and Professor George Chauncey a History professor from the University of Chicago to discuss the history of discrimination against homosexuals and bisexuals. They offered Professor Kenneth Sherrill to describe gays' and bisexuals' vulnerability in society and to discuss their political powerlessness. All of their witnesses in one way or another testified that a person's homosexuality or bisexuality is not relevant to the merit of the individual.

One of the hot debates among witnesses addressed the question of whether homosexuality is inborn, a product of "nature", or a choice based on life experiences, a product of "nurture". Plaintiffs strongly argue that homosexuality is inborn. All the suspect and quasi- suspect classes, race, alienage, national origin, gender and illegitimacy, are inborn. Defendants argue that homosexuality or bisexuality is either a choice, or its origin has multiple aspects or its origin is unknown. The preponderance of credible evidence suggests that there is *a* biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is *some* genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

The federal court in *High Tech Gays v. Defense Industrial Security Clearance Office*, *supra*, concluded that there is a history of discrimination against gays. That same court concluded that gays were *not* a suspect class, however, because they failed to establish two other required elements. This court concludes as did the court

in *High Tech Gays* that there is a history of discrimination against homosexuals.

The court cannot conclude, however, that homosexuals and bisexuals remain vulnerable or politically powerless and in need of "extraordinary protection from the majoritarian political process" in today's society. Failure to prevail on an issue in an election, such as Amendment 2 is not a demonstration of political powerlessness. Indeed, in the case of the vote on Amendment 2, the evidence supports a finding of the political power of gays and bisexuals. According to the figures presented to the court, more than 46% of the Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness. The President of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances such as the three city ordinances in the present case. Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.

The evidence at trial was that there is no identifiable majority in American politics. Numerical majorities of whites, heterosexuals and women were identified, but each numerical majority is so internally divided that it does not form an effective political majority. Therefore, the evidence showed political majorities are formed through the process of coalition building on an issue by issue, or election by election, basis. Those coalitions come together or do not come together to the level of a majority. What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is the key to political power. They are not therefore politically vulnerable or powerless. Homosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements to be found a suspect class.

Case law has not clearly differentiated between the elements of a "suspect" class and a "quasi-suspect" class. Plaintiffs similarly have not established to the satisfaction of this court what those elements are, how they are distinguished from a suspect class, and how they

apply to homosexuals and bisexuals. There are two recognized "quasi-suspect" classes, gender and illegitimacy. Neither of the existing quasi-suspect classes encompass homosexuals and bisexuals. No real effort was put forth to establish that homosexuals and bisexuals fit the existing definitions. Plaintiffs have failed to carry their burden to establish that homosexuals are a quasi-suspect class.

USE OF RATIONAL BASIS TEST

Finally, plaintiffs ask that this court address Amendment 2 using the rational basis test. The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

The court notes that two recent cases have applied a rational basis test to excluding homosexuals from the military. In each case, however, no fundamental right was involved. *Dahl v. Secretary of U.S. Navy*, 830 F. Supp. 1319 (E.D. Cal. Aug. 30, 1993) and *Steffan v. Aspin*, 1993 W.L. 465530 (D.C. Cir.) (November 16, 1993). Those cases examined the question of homosexuality in the military and addressed the historic "military deference" which has been part of earlier decisions in the area. Both cases found there was no rational basis for excluding homosexuals from the military.

In *Steffan* Chief Judge Mikva pointed out that the case was different from *Bowers v. Hardwick*, 478 U.S. 186 in that *Bowers* dealt with homosexual conduct while *Steffan* dealt with homosexual orientation. He also acknowledged that whether an agency of the federal government can discriminate on the basis of sexual orientation "remains an open question," citing to *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), aff'd in part and rev'd in part sub nom *Webster v. Doe*, 486 U.S. 592 (1988). Chief Judge Mikva further acknowledged that his decision in *Steffan* was only the beginning of the answer to that "open question." In *Dahl* the Federal District Court examined at length the application of the rational basis test to excluding homosexuals from the military and found the ban did not stand up to even that fairly minimal standard of review.

These cases do not impact on the present decision because of the fundamental right involved in the present case and the necessarily different standard of review.

JUDGMENT

Amendment 2 is found to be unconstitutional and the court orders that the preliminary injunction be made permanent.

So ordered this 14th Day of December, 1993.

BY THE COURT:

H. JEFFREY BAYLESS
District Court Judge

APPENDIX D

SUPREME COURT, STATE OF COLORADO
No. 93SA17 JULY 19, 1993

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. JEFFREY BAYLESS, Judge

EN BANC ORDER AFFIRMED

CHIEF JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON dissents.

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (referred to collectively as "defendants") appeal the trial

court's entry of a preliminary injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, the requisite number of qualified voters submitted petitions to the secretary of state to present to the electorate a new section 30 to article II of the Colorado Constitution. The proposed constitutional amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).[1] The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

[1]Art. II, § 1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, § 2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States."

On November 12, 1992, Richard G. Evans, along with eight other persons ("individual plaintiffs"), and the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen ("governmental plaintiffs") (referred to collectively as "plaintiffs") filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment is unconstitutional. This contention was premised on several state and federal constitutional provisions.[2]

After plaintiffs' request for an expedited hearing on the merits was rejected, they filed a motion seeking to preliminarily enjoin the enforcement of Amendment 2 which was to go into effect on or

[2]The individual plaintiffs claim that Amendment 2 violates their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution because it fails to rationally advance a legitimate governmental interest and because it places unique burdens on plaintiffs' ability to participate equally in the political process. They also challenged the amendment on numerous First Amendment grounds including that it violates their right to petition their government for a redress of grievances; that it violates their rights to free expression and association; that it violates the constitutional prohibition against the establishment of religion; and that it is unconstitutionally vague. They also alleged that the initiative process by which Amendment 2 was passed violates the Guarantee Clause of Article IV, Section 4, of the United States Constitution. Lastly, the individual plaintiffs allege that Amendment 2 prohibits state courts from enforcing statutes, regulations, ordinances, and policies concerning discrimination based on sexual orientation and therefore, violates the Supremacy and Due Process Clauses of the Federal Constitution and art. II, § 6, of the Colorado Constitution.

Two of the governmental plaintiffs urge that Amendment 2 be construed so as not to affect their home rule powers. The Boulder Valley School District RE-2 asserts that Amendment 2 may violate local control over educational policies protected by art. IX, § 15, of the Colorado Constitution. All of the governmental plaintiffs claim that the amendment subjects them to potential liability under the Supremacy Clause of the Federal Constitution.

before January 15, 1993.[3] In support of this motion, plaintiffs argued that Amendment 2 deprives them of the First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws. The First Amendment claim was based on the contention that Amendment 2 eliminates all potential means of redress for private retaliation or discrimination against gay men, lesbians, and bisexuals. Accordingly, the First Amendment requires the government to demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. This burden, plaintiffs maintained, could not be met by the state. The trial court neither addressed nor relied on this argument in rendering its decision.

Plaintiffs presented two separate arguments under the Equal Protection Clause. First, that Amendment 2 violates their right to equal protection of the laws insofar as it denies gay men, lesbians, and bisexuals the opportunity to participate equally in the political process. Second, that Amendment 2 lacks a rational basis for the burdens it imposes on gay men, lesbians, and bisexuals.

The trial court conducted an evidentiary hearing to consider the motion. Following its conclusion, the court issued a temporary restraining order. The next day, the trial court held that plaintiffs had met their burden under the six-part test of *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982), which sets forth the applicable standard for the issuance of a preliminary injunction and accordingly, granted plaintiffs' motion barring the enforcement of Amendment 2 pending the outcome of a trial on the merits.[4]

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[3]Art. V, § 1, of the Colorado Constitution provides that state constitutional amendments passed via the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed."

[4]Under *Rathke*, before a trial court may issue a preliminary injunction, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Rathke*, 648 P.2d at 653. If this threshold requirement is met, the trial court must find that the moving party has demonstrated: a reasonable probability of success on the merits; a danger of

More specifically (and of central importance to this appeal) the trial court concluded that plaintiffs had met the threshold requirement of *Rathke* by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The court reached this conclusion by reasoning that Amendment 2 "may burden fundamental rights of an identifiable group." The fundamental right, the court went on, was "the right not to have the State endorse and give effect to private biases."[5]

The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits. *See Bollier v. People*, 635 P.2d 543, 545 (Colo. 1981) (statutes are presumed constitutional until and unless the contrary can be shown beyond a reasonable doubt).[6]

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real, immediate, and irreparable injury which may be prevented by injunctive relief; that there is no plain, speedy, and adequate remedy at law; that the granting of a preliminary injunction will not disserve the public interest; that the balance of equities favors the injunction; and that the injunction will preserve the status quo pending a trial on the merits. *Id.* at 653-54.

[5]The trial court cited *Palmore v. Sidoti*, 466 U.S. 429 (1984) and *Reitman v. Mulkey*, 387 U.S. 369 (1967), as the primary support for this conclusion. The court quoted the Supreme Court's statement in *Palmore* that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," *Palmore*, 466 U.S. at 433, and stated that *Reitman* stood for the proposition that it was unconstitutional to take "private discrimination and . . . [give] state support to it."

[6]We note that this presumption is all the more forceful in the context of a constitutional amendment. This is the case not only because here we deal with a constitutional provision as opposed to a statute, but in recognition of the broad powers which our state constitution places in the people. *See supra* note 1.

Defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. The basis of defendants' challenge to the preliminary injunction pertains only to the trial court's determination that the threshold requirement of *Rathke v. MacFarlane* had been met (*i.e.*, that injunctive relief is necessary to protect existing fundamental constitutional rights). Accordingly, the gravamen of defendants' allegation of error is their contention that the trial court "did not base its decision on any direct precedent," but rather "extrapolated from several federal court decisions" the right identified and allegedly infringed by Amendment 2. Moreover, defendants argue, there is no applicable legal precedent or established right under the Equal Protection Clause of the United States Constitution which Amendment 2 can be shown to infringe upon. Defendants conclude, therefore, that "the lower court's order was fundamentally flawed, and cannot be sustained."

Plaintiffs have presented to this court the same equal protection arguments that were made to, but not relied on by, the trial court. They do not urge that we base our decision on the precise right identified and relied on by the trial court in rendering its decision. To the contrary, they have argued to this court that the right identified by the trial court, when "read in light of the arguments actually presented to [it] . . . is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." In short, plaintiffs urge us to rely only on the equal protection arguments which they have relied on, and that the trial court's ruling should be construed to have done the same.

Before turning to the merits, we first set forth the applicable standard of review which governs our decision.

II

"The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court." *Rathke*, 648 P.2d at 653. Consequently, an appellate court reviewing the issuance of a preliminary injunction will usually do so with great deference to the conclusion reached by the lower court. Only if the lower court's ruling was manifestly unreasonable, arbitrary, or unfair will an appellate court ordinarily substitute its judgment for that of the lower court. *People v. Milton*, 732 P.2d 1199, 1207 (Colo. 1987). Where

the issue under review on appeal concerns only legal, as opposed to factual, questions however, the lower court's judgment is subject to independent review on appeal. *See Bloomer v. Board of County Comm'rs of Boulder County*, 799 P.2d 942, 944 (Colo. 1990) (appellate courts need not defer to trial courts when reviewing questions of law).

The question before us is whether the trial court properly determined that the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1987), had been met by plaintiffs. Since that requirement pertains only to whether an existing constitutional right is infringed by Amendment 2, the question we review is strictly a question of law. *Lafferty v. Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991) (constitutional standard is a question of law subject to *de novo* review on appeal), *cert. denied*, 112 S. Ct. 1942 (1992). Consequently, we independently review the question of whether Amendment 2 has been shown to violate an existing constitutional right.[7]

III

It is important to stress at the outset that the Equal Protection Clause of the United States Constitution applies to all citizens, and not simply those who are members of traditionally "suspect" classes such as racial or ethnic minorities. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, *see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (homosexuals neither a suspect nor quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989)

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[7]It is important to note in this context that the parties agree that in reviewing the order of the trial court, we are not limited to assessing only the right identified and relied on by the trial court in reaching its conclusion. Rather, a party "may defend the judgment of the trial court . . . on any ground supported by the record, so long as the party's rights are not increased under the judgment." *Farmer's Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). As noted above, the plaintiffs have presented the same arguments to this court as those made to, but not relied on, by the trial court.

(same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990), and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them.

It is well settled that there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440 (citations omitted).

Strict scrutiny review -- the most exacting standard of review under the Equal Protection Clause -- is reserved for statutes or state constitutional amendments that discriminate against members of traditionally suspect classes, *see, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin), or infringe on any fundamental constitutional right, *City of Cleburne*, 473 U.S. at 440. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Intermediate review, which requires a showing that the law in question is substantially related to a sufficiently important governmental interest, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), has been applied in the context of laws which draw distinctions based on gender, *id.* at 723-24, and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265 (1978), but not to those laws which create differential treatment based on age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

Thus, in reviewing the trial court's determination that the plaintiffs carried their burden of establishing the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), we first must determine which standard applies and second, whether Amendment 2 can be shown, under that standard, and to a reasonable degree of probability, to violate the guarantee of equal protection of the laws.

A

The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time. *See* John Hart Ely, *Democracy and Distrust* 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large -- with ensuring broad participation in the processes and distributions of government"); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1114 (1975) ("no institution is more central to the United States' system of representative democracy than the election").[8]

The value placed on the ability of individuals to participate in the political process has manifested itself in numerous equal protection cases decided by the Supreme Court over the last thirty years. These include the reapportionment cases, *see, e.g., Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964), cases concerning minority party rights, *see, e.g., Williams v. Rhodes*, 393

[8]Indeed, the significance of political participation is evidenced by the fact that nearly half the amendments to the Constitution adopted since 1791 have concerned the franchise and election procedures. *See* U.S. Const. amends. XII (prescribing the method of electing the President and Vice President), XV (prohibiting the denial of the franchise on the basis of race, color, or previous condition of servitude), XVII (providing for the right to vote directly for United States Senators), XIX (extending the franchise to women), XXIII (extending the franchise to residents of the District of Columbia), XXIV (abolishing the poll tax), XXVI (extending the franchise to 18-year-olds).

U.S. 23 (1968), cases involving direct restrictions on the exercise of the franchise, *see, e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), and cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes, *see, e.g., Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982); *Gordon v. Lance,* 403 U.S. 1 (1971); and *Hunter v. Erickson,* 393 U.S. 385 (1969). When considered together, these cases demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny.[9] *See Dunn v. Blumstein,* 405 U.S. at 336 ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). *See also,* Laurence H. Tribe, *American Constitutional Law* 1062 (2d ed. 1988) ("At their core, all voting-related rights are rights to participate in [the] process [of representative government], and the import of the process for our

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[9]Strict judicial scrutiny is warranted when participatory rights are infringed not only because a *fundamental* right is at stake, *see Kramer*, 395 U.S. at 626-29, but also because

> [t]he presumption of constitutionality and the approval given 'rational' classifications in other types of enactments[] are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Id. at 628. *See also Reynolds v. Sims*, 377 U.S. 533, 565 (1964). That is, the ordinary assumption which informs judicial review of legislation that "even improvident decisions will eventually be rectified by the democratic process[] and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted," *Vance v. Bradley*, 440 U.S. 93, 97 (1979), is rendered inapplicable when participatory rights are at issue.

system of government freights them with their indisputable moment.").

The Supreme Court has consistently struck down legislation which establishes preconditions on the exercise of the franchise. These cases, generally speaking, are the types which most clearly violate the guarantee of equal protection because the legislation under review has the effect of directly "[f]encing out," *Carrington v. Rash,* 380 U.S. 89, 94 (1965), certain classes of voters. Thus, the Court has held that the requirement that voters pay a poll tax, *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), be civilians, *Carrington,* or have property or children, *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621 (1969), before they can exercise the right to vote runs afoul of the Equal Protection Clause. In reviewing this sort of legislative restriction on the franchise, the Court in *Kramer* expressed the standard of review and rationale for applying that standard in the following terms:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27.

As *Kramer* clearly demonstrates, the danger presented by such restrictive legislation is that it may deny "any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627. Thus, to the extent that legislation impairs a group's ability to effectively participate (which is not to be confused with successful participation) in the process by which government operates, close judicial scrutiny is necessitated.

This same emphasis on the value of equal participation emerges from a second group of cases which addresses the issue of reapportionment. In *Reynolds v. Sims,* 377 U.S. 533 (1964), for example, the Court acknowledged the importance of political

participation and the need for the most searching standard of judicial scrutiny when any effort is made to limit participation, in recognition of the fact that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights], are illusory if the right to vote is undermined").

Unlike the situations presented in *Carrington*, *Kramer*, and *Harper*, however, the *Reynolds* Court was not confronted with legislation which set a precondition on the right to vote -- no individual or group was precluded, or even impeded, from voting. Rather, the question presented in *Reynolds* concerned the Equal Protection Clause's bearing on participatory effectiveness, *i.e.*, the right to have one's vote be as meaningful as the votes of others.[10] Consequently, the Court's opinion in *Reynolds*, as well as in the other reapportionment cases, reflects the judgment that dilution in the effectiveness of certain voters' exercise of the franchise violates the guarantee of equal protection of the laws not simply because citizens are guaranteed the right to vote, but because that right must be preserved in a meaningful, effective manner. *Reynolds*, 377 U.S. at 565 ("each and every citizen has an inalienable right to full and effective participation in the political processes . . ."); *Board of Estimate of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) (same). In short, equal protection requires that voters are able to exercise the right of franchise on an even footing with others. *See Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

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[10]In *Reynolds* the Supreme Court held that under the Equal Protection Clause, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579. The Court required "*substantial* equality" in recognition of the fact "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577.

This principle has also been consistently relied on to strike down legislation in a third category of political participation cases -- the "candidate eligibility" cases. For example, the Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), reviewed a series of Ohio statutes which "made it virtually impossible," for new political parties with widespread support, or an old party which enjoyed very little support, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States. *Id.* at 24. The Court observed that the state statutes placed significant burdens on "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," because a "vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[11] *Id.* at 31. The Court, again applying the strict scrutiny standard of review, concluded that only a compelling interest could justify "imposing such heavy burdens on the right to vote and to associate," and held that Ohio had failed to make such a showing. *Id.*

Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), Illinois statutes that discriminated against minority parties in local elections were held invalid under the Equal Protection Clause.[12] Applying the strict scrutiny standard, the Court invalidated the Illinois laws, holding that they unnecessarily restricted a constitutionally protected liberty, even while acknowledging that States have a legitimate interest in regulating the number of candidates that appear on a ballot.

The "precondition," reapportionment, and "candidate eligibility" cases are not dispositive of, or directly controlling on, our decision here, as Amendment 2 falls within none of those three categories of cases. Admittedly, those decisions addressed entirely distinct questions and constitutional problems from those presented here.

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[11]The Court also held that the Ohio laws burdened "the right of individuals to associate for the advancement of political beliefs . . . ." *Rhodes*, 393 U.S. at 30.

[12]The Illinois statutes in question drew a distinction between the requisite number of signatures by eligible voters needed to place an independent candidate or a new party on the ballot at the state level from the number required to do so at the local level.

Nevertheless, it would be erroneous to conclude that those decisions are entirely inapposite. In the course of invalidating the laws at issue in those cases, the Court consistently recognized the paramount importance of political participation in our system of government,[13] and articulated the fundamental principle which guided its decision in those cases: The Equal Protection Clause guarantees the fundamental right to participate equally in the political process and thus, any attempt to infringe on that right must be subject to strict scrutiny and can be held constitutionally valid only if supported by a compelling state interest. This principle is what unifies the cases, in spite of the different factual and legal circumstances presented in each of them. Thus, while all three categories of cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.

This principle has received its most explicit, and nuanced, articulation in yet another category of cases where the legislation at issue bore a much closer resemblance to the question presented by Amendment 2. This category of cases involves legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters. In each case, the legislation was held to be violative of equal protection.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court struck down a charter amendment enacted by the voters of Akron, Ohio, which required any fair housing ordinance to be approved by the electorate, whereas other ordinances could be enacted by the city council. The Court held that the Akron amendment deprived minority groups of equal protection because it "place[d] special burdens on racial minorities within the governmental process." *Hunter*, 393 U.S. at 391.

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[13]Indeed, in *Illinois State Board of Elections*, 440 U.S. at 184, Justice Marshall, speaking for the Court, stated that "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

In reaching this conclusion, the Court recognized that the amendment was aimed at minority racial groups.[14] However, its opinion speaks to concerns which are broader than the repugnancy of racial discrimination alone. Thus, Justice White, speaking for the Court, noted that Akron was free to require a plebiscite as to "all its municipal legislation," but having chosen to do otherwise, he concluded that Akron could

> no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 393 (emphasis added). It is significant to note that in support of this proposition, the Court did not rely on any precedent dealing with racial minorities in the context of voting but instead, cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), neither of which had anything to do with discrimination against racial, or any other traditionally suspect class of persons.

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[14]The *Hunter* Court noted that "[h]ere . . . there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters," *Hunter*, 393 U.S. at 389, and observed that "[b]ut for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390. The Court acknowledged, however, that "[i]t is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end," *id.*, yet the Court also noted that the Akron amendment "nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.* at 391. Thus, the Court concluded that while the amendment was facially neutral, "the reality is that the law's impact falls on the minority." *Id.*

It is also notable that Justices Harlan and Stewart, both of whom dissented in *Reitman v. Mulkey*, 387 U.S. 369 (1967),[15] concurred separately to the majority opinion in *Hunter*. After articulating their disagreement with the *Reitman* Court, they observed that, unlike the California initiative, "the City of Akron [had] not attempted to allocate governmental power on the basis of any general principle." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).[16] To the

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[15]In *Reitman*, the Supreme Court invalidated an amendment to the California Constitution which had been passed by the initiative process. "Proposition 14" protected property owners' right to discriminate, on any grounds, in the sale or rental of their real property. The immediate effect of the amendment was to repeal existing state prohibitions on racial discrimination in housing and to prohibit the passage of similar measures in the future. *Reitman*, 387 U.S. at 374.

The Supreme Court held that Proposition 14 violated the Equal Protection Clause because it rendered "[t]he right to discriminate, including the right to discriminate on racial grounds . . . immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377.

[16]Justices Harlan and Stewart elaborated on the "general principle" theme as follows:

> The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the constitution, or they may lose if the constitution adopts a position of strict neutrality on the question. But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

contrary, the fair housing statute was passed with the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." *Id.* This, the concurring Justices concluded, violated the Equal Protection Clause.

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), presents another situation in which an issue important to a minority group was removed from consideration via the normal political process. In *Washington*, the Court considered the constitutionality of an initiative which attempted to prohibit local school districts from utilizing mandatory busing as a means of achieving desegregation.[17] Relying on *Hunter*, the Court held that the voters, in passing Initiative 350, had impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure public benefits. *Washington*, 458 U.S. at 467-70.

In reaching this conclusion, the Court embraced Justice Harlan's "neutral principles" formulation in *Hunter* and referred to it as the "simple but central principle," *id.* at 469, underlying the majority opinion in *Hunter*. More specifically, the Court held that the Fourteenth Amendment reaches political structures that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. It also stated that "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack . . . . Because such laws make it more difficult for *every* group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* at 470 (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (emphasis in

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Hunter, 393 U.S. at 394-95 (Harlan, J., concurring) (citation omitted).

[17]Prior to the passage of Initiative 350, which prohibited school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home (and set forth a number of exceptions to this rule), *see Washington*, 458 U.S. at 462-63, "the power to determine what programs would most appropriately fill a school district's educational needs--including programs involving student assignment and desegregation--was firmly committed to the local board's discretion." *Id.* at 479-80.

original)). In contrast, the initiative at issue in *Washington* did "not attemp[t] to allocate governmental power on the basis of any general principle," *id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)), but rather, used "the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Id.*

Thus, while *Washington*, like *Hunter*, involved an initiative that affected a racial minority, and while this fact weighed heavily in the Court's consideration of this case, it would be erroneous to conclude that the "neutral principle" precept is applicable only in the context of racial discrimination. Indeed, such a reading of *Hunter* and *Washington* would be antithetical to the neutral principle itself, for the requirement of neutrality would in fact only be a requirement of nondiscrimination with respect to racial minorities -- and not at all a requirement that legislation must "attemp[t] to allocate governmental power on the basis of any general principle." *Id.* at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)). Thus, while *Hunter* and *Washington* are indeed cases which involved racial minorities, the principle articulated in those cases clearly is not one that can logically be limited to the "race" context alone.[18]

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[18]In *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. Ct. App. 1991), the court, in reviewing a proposed ballot initiative whereunder "persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable," concluded that:

> Precisely this arrangement was condemned in *Hunter v. Erickson* . . . in which the court invalidated an ordinance which similarly required voter approval for any ordinance prohibiting housing discrimination on the basis of race, religion, or ancestry.
>
> The court held that such an ordinance drew an impermissible "distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends". . . . Although the ordinance did not focus on members of minority groups, the court observed that "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination

This was made clear in *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the Court upheld a West Virginia statute that required approval by a 60% majority of any proposed increase in bond indebtedness or state tax rates. Plaintiffs, a group of individuals who had voted in favor of two proposals covered by the 60% requirement, sought a declaratory judgment that the 60% requirement was unconstitutional under the Equal Protection Clause.[19]

The Supreme Court, in reversing the West Virginia Supreme Court of Appeals, turned its attention to the applicability of *Hunter*. The Court distinguished *Hunter* on the grounds that, unlike the West Virginia statute, which "applie[d] equally to all bond issues for any purpose, whether for schools, sewers, or highways," the municipal ordinance in *Hunter* subjected "fair housing legislation alone . . . to an automatic referendum requirement." *Gordon*, 403 U.S. at 5. Furthermore, unlike *Hunter*, where "[t]he class singled out . . . was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" the Court was unable to discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Id.* at 5. Thus, the Court concluded, "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* (citation omitted).

The significance of the *Gordon* Court's discussion of *Hunter* is twofold. First, it is meaningful that the issue in *Gordon* had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*. In the course of that discussion, no mention was made of the fact that the West Virginia law was racially neutral, whereas the Akron law clearly was not. If, as the defendants suggest here, *Hunter* is a "race" case and nothing more, the Supreme Court could have summarily dismissed the notion

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. . . ."

[19]One proposal called for the issuance of general obligation bonds for the purpose of building a new school and improving existing educational facilities. The second proposal authorized the Board of Education to levy additional taxes to support current expenditures and capital improvements. *Gordon*, 403 U.S. at 3. Of the votes cast, 51.55% favored the bond issue and 51.51% favored the tax levy. *Id.*

that it was applicable in *Gordon*. The fact that the Court did not do so, however, strongly suggests that the holding of *Hunter* cannot be limited in application only to the review of legislation which discriminates on the basis of race.

Second, although the *Gordon* Court recognized that the Akron law singled out those who would benefit from laws barring racial, religious, or ancestral discrimination, no significance was placed on the nature of the class discriminated against in *Hunter*. Rather, the salient aspect of *Hunter* which distinguished it from the situation presented in *Gordon* was the absence of a group of voters that was "independently identifiable" apart from the group created by the statute itself.[20]

When taken together, these facts clearly support the conclusion that *Hunter* applies to a broad spectrum of discriminatory legislation. This becomes abundantly clear in light of the *Gordon* Court's articulation of the controlling constitutional standard: "We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." *Gordon*, 403 U.S. at 7.[21]

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[20]In *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 268 n.13 (1977), the Court cited *Gordon* and *Hunter* as support for the proposition that "a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class."

[21]In so concluding, we are mindful that a majority of the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971), upheld the constitutionality of a California constitutional amendment that required majority approval in a community election for the construction of any low-rent housing project. The Court held that the mandatory referendum procedure, which was not limited to proposals for low-cost public housing, ensured democratic decisionmaking and did not violate the Equal Protection Clause. In reaching this conclusion, the Court declined to "extend" *Hunter* to a provision which was not "aimed at a racial minority." *James*, 402 U.S. at 141.

Three Justices dissented, not by taking issue with the majority's use of *Hunter*, but on the basis that the provision should be invalidated on the

B

We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.[22]

We reject defendants' contention that Amendment 2 cannot be understood to infringe on any recognized right protected under the Equal Protection Clause. We do so for a number of reasons. First, defendants urge that the authority relied on in reaching our conclusion, when "properly analyzed," recognizes a cognizable equal protection claim "only when the political process has been

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grounds that poverty is a suspect classification. It is significant to note that all of the Justices who joined in the majority opinion in *James* also joined the later opinion in *Gordon* (as did Justice Douglas who did not participate in *James*), which itself made no reference to *James*. The two Justices who dissented in *Gordon* (Justices Brennan and Marshall) did not do so on the basis of the majority's application of *Hunter*.

Thus, we are of the opinion that *James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*.

[22]Professor Michelman characterizes the Supreme Court's jurisprudence in the participation cases as establishing that,

> by force of the equal protection clause, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,". . . [T]hat this right is among those it classes as "fundamental,". . . so that any restriction of it "must be carefully and meticulously scrutinized,". . . to determine whether it is "necessary to promote a compelling state interest." Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443, 459 n.63 (1989).

restructured to place unusual burdens upon racial groups, or, in the most expansive sense, [upon politically powerless groups]." This contention belies the fact that much of the authority relied on in reaching our conclusion did not involve racial groups.[23]

Moreover, as *Gordon v. Lance*, 403 U.S. 1 (1971), makes clear, and the language of *Hunter v. Erickson*, 393 U.S. 385 (1969), itself indicates, the principle that a "State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any groups smaller representation than another of comparable size," *Hunter*, 393 U.S. at 393, does not apply simply to racial minorities.

Finally, if the cases referred to above were decided solely on the basis of the "suspect" nature of the classes involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were these simply "race cases," the Supreme Court would have been required to do nothing more than note that the legislation at issue drew a classification that was inherently suspect (*i.e.*, that discriminated on the basis of race), and apply strict scrutiny to resolve those cases -- irrespective of the right, entitlement, or opportunity that was being restricted. *Compare Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 n.9 (1969) ("we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation") *with Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in *Shapiro [v. Thompson*, 394 U.S. 618 (1969)] was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement.").

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[23]*See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Gordon v. Lance*, 403 U.S. 1 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

We similarly reject defendants' contention that the right of equal political participation "can only work when applied to suspect classifications . . . [for any broader application will] necessarily mandate[] that all legal and policy choices be made at the lowest governmental level possible." This argument is based on defendants' observation that the Colorado Constitution creates numerous burdens which, in order to be overcome, require a constitutional amendment, such as article XVIII, section 9, (permitting limited gaming only in Central City, Blackhawk, and Cripple Creek) and article XIX, section 2, (prohibiting the General Assembly from proposing amendments to more than six articles of the state constitution at the same session).

While defendants are correct in observing that there are constitutional provisions which create some barriers to those who might seek governmental action in conflict with these provisions, it cannot be said that the provisions cited by defendants isolate any "independently identifiable group," *Gordon v. Lance*, 403 U.S. 1, 5 (1971), from pursuing its political objectives. In fact, the precise argument defendants now advance was expressly rejected by the Supreme Court in *Gordon*. As noted above, the constitution and statutes at issue in *Gordon* required a 60% majority before certain bonds or tax levies could be passed. The Court, in refusing to apply the principle of *Hunter v. Erickson*, 395 U.S. 385 (1969), under the facts of *Gordon*, noted that "[i]n contrast [to the class singled out in *Hunter*] we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Gordon*, 403 U.S. at 5 (citation omitted). We find this reasoning both controlling and persuasive here. The same cannot be said, however, of Amendment 2.[24]

We therefore conclude that defendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit. Similarly, we reject their argument that the above cited authorities are properly understood only as "suspect class" cases, and not "fundamental rights" cases. We turn, therefore, to the question of whether Amendment 2 has been shown, to a reasonable degree of probability, to infringe on the fundamental

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[24]*See infra* at 32-37.

right to participate equally in the political process beyond a reasonable doubt.

IV

In reviewing Amendment 2, we do so in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967).

The immediate objective of Amendment 2 is, at a minimum,[25] to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. *See* Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code § § 12-1-2 to -4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, § § 28-91 to -116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination

[25]The parties sharply disagree on the scope of Amendment 2's provisions. For example, defendants argue that Amendment 2 "does not prevent the enforcement of rights derived from other sources including federal law; it allows enforcement of rights from private contracts; and does not prevent private companies [from adopting policies prohibiting discrimination based on sexual orientation]," and conclude that Amendment 2 "prohibits only the recognition or enforcement of state or locally created civil rights protections above and beyond those required by federal law." Plaintiffs, in contrast, argue that "defendants' interpretation bears little resemblance to the language of Amendment 2," and conclude that, on its face, the amendment clearly limits the sort of redress that defendants argue it does not.

The precise scope of Amendment 2 need not be determined here, however, because neither the parties, nor their amici, have contended that Amendment 2 does not prohibit the enactment of antidiscrimination laws by state or local entities. Since all agree that Amendment 2 unambiguously attempts to do this, and since that restriction alone provides a sufficient basis for our conclusion, we need not determine what broader application Amendment 2 might have.

for "all state employees, classified and exempt" on the basis of sexual orientation); Colorado Insurance Code, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.[26]

The "ultimate effect"[27] of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial,

[26]Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation. *See* Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, p. 10, 1992).

[27]*See supra* note 25.

religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . .[a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.[28]

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[28]As for the State's contention that "[t]he plaintiffs continue to have the ability to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in the process," we think this misconstrues the nature of plaintiffs' participatory rights. While the State is quite right that the plaintiff class, like any other members of society, has no right to successful participation in the political process, the fact remains that its unsuccessful participation is mandated by the provisions of Amendment 2. In contrast to all other members of the electorate whose successful or unsuccessful participation in the process cannot be determined until ballots, votes, charters, etc., have been counted or voted upon, with the exception of a state constitutional amendment, gay men, lesbians, and bisexuals are told that "you can appeal to government on those issues of concern to you, but you will, by virtue of Amendment 2, lose -- irrespective

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation.[29]

Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause.

Because the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review, *see Plyler v. Doe*, 457 U.S. 202, 217 (1982); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985), we conclude that plaintiffs have met their burden under *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982).

V

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), and that "[a] citizen's constitutional rights can hardly be infringed

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of your ability to summon the support of others, or carry a majority in an election."

[29]Indeed, this class of persons had done precisely this with some measure of success. *See supra* at 33-34.

simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964).

We reject defendants' argument that the trial court erred in granting a preliminary injunction enjoining defendants from enforcing Amendment 2 pending a trial on the merits of plaintiffs' constitutional challenge.

Order affirmed.

JUSTICE ERICKSON dissents.

Evans v. Romer, No. 93SA17
JUSTICE ERICKSON dissenting:

I respectfully dissent. This is an appeal of a district court order granting a preliminary injunction that prohibits the Governor and the Attorney General from enforcing a voter- initiated amendment to the Colorado Constitution ("Amendment 2").[1] The issue before us is whether the district court for the City and County of Denver properly concluded that the appellees met the requirements set forth in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), and C.R.C.P. 65, for the issuance of a preliminary injunction. Because we are reviewing the district court's underlying legal premise for the injunction, we are obligated to apply a de novo standard of review. Based on that standard, I would reverse and discharge the preliminary injunction, and remand for trial on the permanent injunction.

The district court issued the preliminary injunction based on its conclusion that Amendment 2 must be evaluated under the strict scrutiny standard of review. The strict scrutiny standard of review was found to be applicable based on a *fundamental right* "not to have the State endorse and give effect to private biases" with respect to "an identifiable class." The district court's delineation of the fundamental right supporting the preliminary injunction has never been identified or recognized by the United States Supreme Court or by any other court. As such, the district court's recognition of a new fundamental right is based on an underlying legal premise that is erroneous.

The majority upholds the preliminary injunction and agrees that Amendment 2 should be evaluated under the strict scrutiny standard of review. Unlike the district court, however, the majority concludes that strict scrutiny applies based on the recognition of a different *fundamental right*, "the right to participate equally in the political process." Maj. op. at 14. In my view, based on the United States Supreme Court precedent cited in the majority opinion, the majority's conclusion is also erroneous.

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[1]A state constitutional amendment passed through the initiative process "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." *See* Colo. Const. art. V, § 1. The injunction was sought to prevent Amendment 2 from taking effect.

Since I cannot agree that Amendment 2 should be evaluated under the strict scrutiny standard of review based on Supreme Court precedent defining fundamental constitutional rights, I would reverse the district court and discharge the preliminary injunction.

I

On November 3, 1992, Amendment 2 passed by a margin of 813,966 to 710,151. Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the appellees filed suit to permanently enjoin the enforcement of Amendment 2, alleging that it violated provisions of both the Colorado and United States Constitutions. The appellees claimed, *inter alia*, that Amendment 2 violated (1) the rights to freedom of association and expression under the First Amendment; (2) the fundamental right to petition the government for redress of grievances; (3) the fundamental right to vote; and (4) the fundamental right to participate equally in the political process. After the district court rejected the request of the appellees for an expedited hearing on the merits, they filed motions to preliminarily enjoin the Governor and the Attorney General from enforcing Amendment 2.

The appellees based their motion for a preliminary injunction solely on the United States Constitution, claiming that Amendment 2 violated their First Amendment right to freedom of expression and

their Fourteenth Amendment right to equal protection of the laws.[2] In their motion, the appellees did not claim that Amendment 2 violated the Equal Protection Clause because a suspect class was involved.[3] Instead, the appellees based their equal protection

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[2]An amendment to the state constitution cannot be unconstitutional, unless and to the extent it violates the United States Constitution. *Cf.* Colo. Const. art. II, § 2; *Cooper Motors, Inc. v. Board of County Comm'rs*, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955) ("[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States").

[3]The majority recognizes that gay men, lesbians, and bisexuals constitute an "identifiable group." Maj. op. at 33. This conclusion is true, just as is the fact each of the three groups standing alone constitutes an identifiable group based on the sexual orientation and conduct of gay men, lesbians, and bisexuals. The mere fact that a group can be identified, however, does not mean that the group constitutes a suspect class that receives heightened scrutiny under the Equal Protection Clause. *See, e.g.*, *Heller v. Doe*, No. 92-351, 1993 WL 218271, at *5 (U.S. June 24, 1993) (recognizing that the Supreme Court has declined to apply heightened scrutiny to the identifiable groups of the mentally ill or the mentally retarded); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (declining to apply heightened scrutiny to the identifiable group of elderly individuals).

In fact, courts have consistently rejected claims that the identifiable group of homosexuals constitutes a suspect class. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (concluding that homosexuals are neither a suspect or quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (same); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (same), *aff'd*, 470 U.S. 903 (1985); *Steffan v. Cheney*, 780 F. Supp. 1, 10 (D.D.C. 1991) (same).

For example, *Padula* rejected the claim that homosexuals constitute a suspect class by stating that "[i]f the Court [in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude

argument on an alleged infringement of the fundamental right to participate equally in the political process. The appellees claimed that if the district court concluded that Amendment 2 impinged on either the First or the Fourteenth Amendment, a strict scrutiny standard of review should apply under which the State would have the burden of establishing a compelling state interest.[4]

After conducting a four-day hearing and without making any findings of fact, the district court granted the preliminary injunction. In rendering its decision, the district court agreed that the strict scrutiny standard of review applied to Amendment 2. However, the district court did not rely upon either the First Amendment argument advanced by the appellees or address the fundamental right asserted by the appellees in their motion for the preliminary injunction. Instead, the district court held that Amendment 2 must satisfy the strict scrutiny standard of review based on a fundamental right not to have the State endorse and give effect to private biases.[5] Pending

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that state- sponsored discrimination against the class is invidious [because] there can hardly be a more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula*, 822 F.2d at 103. A number of states continue to classify the conduct that defines the class as criminal behavior. *See, e.g.*, Ala. Code § 13A-6-65(a)(3) (1975); Ark. Code Ann. § 5-14-122 (Michie 1987); Ga. Code Ann. § 16-6-2 (1992); Kan. Stat. Ann. § 21-3505 (1988 & 1992 Supp.); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Md. Code Ann. Crimes and Punishment 554 (1954); Mich. Stat. Ann. § 28.355 (Callaghan 1990); Minn. Stat. § 609.293 (1992); N.Y. Penal Law § 130.38 (McKinney 1987); Okla. Stat. Ann. tit. 21, § 886 (West 1983 & 1993 Supp.); S.D. Codified Laws Ann. § 22-22-2 (1988 & 1993 Supp.).

[4]The appellees alternatively asserted that the burdens Amendment 2 imposed on gay men, lesbians, and bisexuals lacked a rational basis.

[5]The appellees assert on appeal that "read in light of the arguments actually presented to the district court, th[e district court's] holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation." As the majority recognizes, this assertion is meritless. *See* maj. op. at 8. The district court's order simply does not address the fundamental rights argument advanced by the appellees or their First Amendment claim.

resolution of this appeal, trial has been set in October 1993, to determine whether a permanent injunction should be issued.

II

Although this case presents a number of legal questions, it is not necessary or appropriate for this court to determine all of the issues raised before the district court. The sole issue before us on this appeal is the validity of the preliminary injunction issued by the district court. As such, the logical starting point is the district court's order and the reasons for the entry of the preliminary injunction. Neither the majority nor the appellees defend the underlying premise of the district court's order which identified a new fundamental right as the basis for applying the strict scrutiny standard of review. The explanation is simple--the district court erred in issuing a preliminary injunction based on a fundamental right not to have the State endorse and give effect to private biases. Before addressing the district court's order, however, it is necessary to outline the appropriate standard of review on appeal for the issuance of a preliminary injunction.

A

It is well settled that an appellate court must reverse the granting of a preliminary injunction if the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Shango v. Jurich*, 681 F.2d 1091, 1096 (7th Cir. 1982); *e.g.*, *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982). In *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), we delineated the standard for a trial court to apply in ruling on a preliminary injunction motion. Before a trial court may issue a preliminary injunction under *Rathke*, "the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing . . . fundamental constitutional rights." *Id.* at 653. Accordingly, to determine whether the threshold requirement of *Rathke* is satisfied, a trial court must analyze whether the United States Supreme Court has recognized the fundamental right at issue. *Id.*; *cf. Dronenburg v. Zech*, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984) (stating that "the only question open to [a lower

court is] whether the Supreme Court has created a right, which, fairly defined, covers the case before [it] or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case [it] must now decide").

The issuance of a preliminary injunction by a trial court must also be guided by sound legal principles. *See Shango*, 681 F.2d at 1096; *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980). When a preliminary injunction is based on an erroneous legal premise, the underlying premise is subject to de novo review by an appellate court, which can determine whether the premise is erroneous. *See Shango*, 681 F.2d at 1096; *Buffalo Courier-Express, Inc. v. Buffalo Evening News*, 601 F.2d 48, 59 (2d Cir. 1979); *Douglas v. Beneficial Fin. Co.*, 469 F.2d 453, 454 (9th Cir. 1972); *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1115 (D.C. Cir. 1969); *accord Bloomer v. Boulder County Bd. of Comm'rs*, 799 P.2d 942, 944 (Colo. 1990). While a determination on appeal that a trial court's underlying legal premise is erroneous does not reflect that the trial court was chargeable with an abuse of discretion, *see Delaware*, 450 F.2d at 620-21, a preliminary injunction predicated on a clear mistake of law may nevertheless require reversal. *Shango*, 681 F.2d at 1096; *Charles*, 627 F.2d at 776; *Delaware*, 450 F.2d at 623.

Based on the foregoing principles, it is appropriate to apply a de novo standard of review in this case to evaluate the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases. A review of Supreme Court jurisprudence concerning fundamental rights is therefore necessary to determine whether the premise relied upon by the district court is erroneous.[6]

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[6]Our review in this case is limited to the United States Constitution. *See supra* note 2 and accompanying text. Accordingly, we are required to follow the pronouncements of the Supreme Court. *People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (stating that state courts are bound by Supreme Court precedent interpreting the federal Constitution and cannot impose greater limitations or afford more protections under the federal Constitution than the Supreme Court has in its decisions); *cf. Lockhart v. Fretwell*, 113 S. Ct. 838, 846

B

Under traditional equal protection analysis, legislation that involves a suspect classification *or* affects a fundamental right is subject to the strict scrutiny standard of review. *Heller v. Doe*, No. 92-351, 1993 WL 218271, at *5 (U.S June 24, 1993); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *see generally* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance and Procedure* 18.3, at 12-28 (2d ed. 1992 & 1993 Supp.) [hereinafter *Treatise on Constitutional Law*]. If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. *See Heller*, 1993 WL 218271, at *5; *Cleburne*, 473 U.S. at 440.

Justice Stone's discussion of "discrete and insular minorities" in his renowned footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), explains the rationale for subjecting legislation involving a suspect classification to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971).[7] Since that time, the Supreme Court has held, without exception, that the strict scrutiny standard of review applies to legislation or state

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(1993) (Thomas, J., concurring) (stating that under the structure of our national system, a state court decision interpreting the federal Constitution is no less authoritative than a lower federal court decision).

[7]Justice Stone explained in footnote 4:

> [W]e need [not] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 152-53 n.4 (citations omitted).

constitutional amendments based on traditionally suspect classifications. *See, e.g., Graham,* 403 U.S. at 372 (alienage); *Loving v. Virginia,* 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States,* 323 U.S. 214, 215 (1944) (national origin).[8]

Similarly, the Supreme Court has held repeatedly that the strict scrutiny standard of review applies to legislation that affects a "fundamental" constitutional right. The identification of a right as a fundamental right is a substantive decision unrelated to equal protection or the technical standards of review. *See* 3 *Treatise on Constitutional Law* § 18.3, at 18; *see generally* 2 *Treatise on Constitutional Law* § 15.7, at 427-37. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the political branches of government and is best characterized as a substantive due process decision. *See* 3 *Treatise on Constitutional Law* 18.3, at 18 n.19; *Bowers v. Hardwick,* 478 U.S. 186, 197 (1986) (Powell, J., concurring); *see also San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution).

For example, the decision of the Supreme Court to find the right to vote to be a constitutionally protected fundamental right that is subject to the strict scrutiny standard of review was a substantive due process determination based on an analysis of the importance of the right to vote and the provisions of the Constitution. *See* 3 *Treatise on Constitutional Law* 18.31, at 766. The Supreme Court has employed similar analysis to recognize the fundamental rights of interstate travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), privacy, *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965), and most of the provisions set forth in the Bill of Rights. *See, e.g., Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972) (using equal protection

[8]In this case, the appellees did not assert before the district court or on appeal that Amendment 2 should be evaluated under the strict scrutiny standard of review based on suspect class analysis. *See also supra* note 3 (listing courts that have rejected argument that homosexuals constitute a suspect class).

analysis to strike down a law that infringed upon fundamental rights within the First Amendment).[9]

For the most part, however, the Supreme Court has refused to expand the list of fundamental constitutional rights. The number of

[9]Under the Due Process Clause of the Fourteenth Amendment, most of the provisions of the Bill of Rights have been applied to the states because the Supreme Court has found them to be "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319 (1937), or "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 148-49, *reh'g denied,* 392 U.S. 947 (1968). Today, virtually all of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment. *E.g., Benton v. Maryland,* 395 U.S. 784 (1969) (incorporating Fifth Amendment protection against double jeopardy); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal prosecution); *Mapp v. Ohio,* 367 U.S. 643 (1961) (incorporating Fourth Amendment regulation against unreasonable search and seizures); *Gitlow v. New York,* 268 U.S. 652 (1925) (incorporating First Amendment free speech protection); *but see Hurtado v. California,* 110 U.S. 516 (1884) (refusing to incorporate grand jury indictment guarantee of the Fifth Amendment).

The rights that have been held applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. *See* 3 *Treatise on Constitutional Law* § 18.39, at 490. As Professors Nowak and Rotunda explain:

> [L]aws which classify persons in terms of their abilities to exercise rights which have specific recognition in the first eight amendments do not generally arise as equal protection issues. In these instances the denial of the right to one class of persons is likely to be held a violation of the specific guarantee without any need to resort to equal protection analysis. Thus, if the state or federal government were to deny to a specific class of persons the right to bail upon certain criminal charges, the classification should be analyzed to determine the compatibility of the law with the substantive guarantees of the eighth amendment prohibition of excessive bail, although it could just as easily be analyzed as an equal protection issue.

Id. at 490-91.

rights that the Supreme Court has found to be fundamental, and therefore worthy of strict judicial scrutiny, is quite limited. Among others, the Supreme Court has refused to declare education, housing, welfare payments, or government employment to be of fundamental constitutional value. *See* 3 *Treatise on Constitutional Law* § 18.42, at 821-31.

Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court rejected the assertion that the federal Constitution conferred a fundamental right on homosexuals to engage in sodomy, is instructive of the type of analysis used by the High Court to address the substantive due process question of whether a fundamental right exists. In answering the substantive due process question, Justice White reviewed prior cases addressing fundamental rights:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (Powell, J.). *See also Griswold v. Connecticut*, 381 U.S., at 506.
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.

Bowers, 478 U.S. at 191-92; *see generally* John E. Nowak, *The "Sixty-Something" Anniversary of the Bill of Rights*, 1992 U. Ill. L. Rev. 445, 462-76 (reviewing different methods of constitutional interpretation).

Having concluded that a fundamental right to engage in homosexual sodomy did not exist, Justice White emphasized that the case also "call[ed] for some judgment about the limits of the Court's role in carrying out its constitutional mandate," *Bowers*, 478 U.S. at 190, and stated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. *There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.* Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95 (emphasis added). Given the express reluctance of the Supreme Court to recognize "new" fundamental rights, I address the district court's order.

C

In this case, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases provided the basis for issuing the preliminary injunction. However, a review of the Supreme Court precedent cited by the district court to justify the issuance of the preliminary injunction leads me to conclude that the Supreme Court has not recognized the fundamental right identified by the district court.

In support of its recognition of a new fundamental right, the district court cited language from *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Palmore v. Sidoti*, 466 U.S. 429 (1984). The district court also referred to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) to bolster its reasoning. Properly analyzed, these cases do not support judicial recognition of a fundamental right not to have the State endorse and give effect to private biases, but rather indicate that the district court extrapolated a fundamental right from the language appearing in the various decisions.

In *Reitman*, the Supreme Court reviewed a voter-initiated state constitutional amendment which the California Supreme Court concluded was intended to encourage and authorize racial discrimination. *Reitman*, 387 U.S. at 376. The California Supreme Court found that the intent of the constitutional amendment was to create a constitutional right to discriminate on racial grounds and therefore dealt with the amendment as though it expressly authorized and constitutionalized the private right to discriminate against racial minorities. *Id.* The Supreme Court accepted the findings of the California court and concluded that "there was no sound reason [to] reject [its] judgment" that the amendment involved racial discrimination in violation of the Fourteenth Amendment. *Id.*

Language subsequently appeared in *Reitman* which was seized on by the district court in support of the recognition of a fundamental right of any identifiable group not to have the state endorse and give effect to private biases. *Reitman* stated:

> The right to discriminate, including the right to discriminate on *racial grounds*, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing *racial discriminations* need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377 (emphasis added). Based on this language from *Reitman*, the district court characterized the analysis of the Supreme Court as involving a fundamental right. The district court's conclusion is erroneous insofar as *Reitman*'s equal protection analysis focused

solely on the racial classification drawn by the constitutional amendment and represents traditional suspect classification analysis. As such, no court or commentator has ever viewed *Reitman*, either alone or in combination with other cases, as having applied fundamental right analysis.

In *Palmore*, the Supreme Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. *Palmore* struck down the lower court's custody order because it represented invidious racial prejudice. In doing so, *Palmore* explicitly stressed the importance of the racial classification and accordingly concluded that the strict scrutiny standard of review applied. *Id.* at 432-33 (stating that "classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny").

Palmore also stated "the Constitution cannot control such prejudices but neither can it tolerate them . . . private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. Despite this language, which was cited by the district court in this case, the fact remains that *Palmore* was based on traditional suspect classification analysis and not a fundamental right not to have the State endorse and give effect to private biases. Like *Reitman*, no court or commentator has ever viewed *Palmore*, either alone or in combination with other cases, as having applied fundamental right analysis.

The district court further found that the citation to *Palmore* in *City of Cleburne* was significant. *City of Cleburne*, however, did not apply the strict scrutiny standard of review and stands only for the proposition that irrational biases cannot, in and of themselves, qualify as a legitimate governmental interest to satisfy rational basis review. The district court also mentioned *Pruitt*, a Ninth Circuit case involving discrimination against homosexuals in the military, because it also cited to *Palmore*. *Pruitt*, however, like *City of Cleburne*, did not apply the strict scrutiny standard of review. As such, neither case can be read as applying fundamental rights analysis.

The cases relied on by the district court as recognizing a fundamental right not to have the State endorse and give effect to

private biases do not apply fundamental rights analysis, but rather involve traditionally suspect classifications or the application of rational basis review. Accordingly, I conclude that the district court's issuance of the preliminary injunction in this case was based on the application of an erroneous legal premise that has never been recognized by the Supreme Court.

III

I am also compelled to address the "fundamental right to participate equally in the political process" because the majority, applying de novo review to the district court's legal conclusion, upholds the granting of the preliminary junction based on its recognition of, and reliance on, a different fundamental right than that identified by the district court.[10] In my view, the majority's underlying legal premise that Supreme Court precedent has recognized such a fundamental right is also erroneous and provides no support for the conclusion that the strict scrutiny standard of review applies in this case.

The majority's extensive review of prior Supreme Court decisions indicates that language discussing citizen participation has appeared in a variety of contexts in numerous equal protection opinions. The traditional reading of these cases, however, suggests that the majority's analysis suffers from the same flaw as the district court's analysis--at no point has the Supreme Court explicitly identified the fundamental right that the majority extrapolates from the Supreme Court decisions on which it relies.

Appropriately categorized, there is no more of a common thread uniting the decisions cited by the majority than there is a common thread of logic or precedent to support the district court's analysis.[11] In my view, the cases cited by the majority all fall within Supreme Court decisions that address either the fundamental right to vote or ballot access, or opinions that involve suspect classifications. Based on a review of each of these three categories, I conclude that the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous.

A

In a long series of cases beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court has held that there is a

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[10]I note that in reviewing a preliminary injunction that has been granted by a trial court, we are not *required* to analyze the alternative grounds raised by the parties before the trial court, but not ruled on, or to discuss grounds not raised below by the parties. Based on the limited grounds on which this case is before us, we need not analyze the assertion of the appellees that a preliminary injunction could have been properly issued based on a fundamental right to participate equally in the political process any more than we need address the original assertions of the appellees that Amendment 2 violated their (1) fundamental right to freedom of expression; (2) fundamental right to petition the government for redress of grievances; or (3) fundamental right to vote. Recognizing this fact, the appellees assert on appeal that the district court's ruling is best construed as holding that Amendment 2 infringes upon the fundamental right of political participation. *See supra* note 5.

Because the district court's ruling cannot be so construed, the majority justifies upholding the injunction on a different legal basis than that relied on by the district court by citing to *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). Neither the majority nor the appellees cite to any case where an appellate court has upheld a preliminary injunction based on different legal grounds than those articulated and relied on by the trial court. However, I agree that if a trial court erred in applying the applicable law, an appellate court, pursuant to its ability to review the underlying legal premises de novo, may apply the correct legal standard and uphold the injunction if supported by the record. *See Rowland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 385 (7th Cir. 1984) (stating that any purely legal determination made by a trial judge in granting or denying a preliminary injunction is subject to plenary appellate review).

[11]The majority's suggestion that a fundamental right to participate equally in the political process encompasses a wide variety of Supreme Court equal protection opinions in many ways is akin to the district court's delineation of the fundamental right it identified based on language drawn from other equal protection decisions.

fundamental right to have one's vote counted equally. *See* 2 *Treatise on Constitutional Law* 15.7, at 435; *e.g.*, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).[12] Traditionally, both commentators and case book authors have characterized these decisions as recognizing a fundamental "right to vote" that is subject to the strict scrutiny standard of review. *See, e.g.*, John E. Nowak et al., *Constitutional Law*, ch. 16, I at 765-76 (2d ed. 1983); 3 *Treatise on Constitutional Law* 18.31, at 388-409; Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121, 150 (1989); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 Mo. L. Rev. 423, 429-33 (1988); David M. Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. 183, 195-202 (1980); *see generally* Gerald Gunther, *Constitutional Law* 787-823 (11th ed. 1985); William B. Lockhart et al., *Constitutional Law: Cases-Comments-Questions* 1316-56 (6th ed. 1986); Ronald D. Rotunda, *Modern Constitutional Law* 598-613 (3d ed. 1989).

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[12]The right to vote undoubtedly includes the right to participate in the *electoral* process by exercising the franchise. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("this Court has made clear that a citizen has a constitutionally protected *right to participate in elections* on an equal basis"); 2 *Treatise on Constitutional Law* § 15.7, at 435; *cf.* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument*, 41 Fla. L. Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in *elections* on an equal basis" as a fundamental right).

Neither the appellees nor the majority, however, contends that the right to participate in the *electoral* process is equivalent to the much more expansive right to participate in the *political* process. *See generally* Laurence H. Tribe, *American Constitutional Law* § 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and association"). Nor does the majority assert that in this case Amendment 2 infringed on the appellees' fundamental right to vote.

Notably, in their general discussion of fundamental rights in their brief before the district court, the appellees mentioned only the fundamental right to vote (including the right to participate in the electoral process) and not the more expansive fundamental right upon which they sought the injunction. The appellees stated:

"The two branches of equal protection law are distinct. Rights considered 'fundamental' for equal protection purposes include the right to interstate travel (burdened by residency requirements); *the right to electoral participation, including the right to vote* (burdened by various qualifications and obstacles); the right of access to the courts (burdened by fees); and the right of privacy (burdened by laws affecting rights to procreation and family)."

By doing so, the appellees appear to concede that the fundamental right to participate in the political process has yet to be identified by the Supreme Court.

The majority recognizes that the decisions it cites involving reapportionment or direct restrictions on the exercise of the franchise are readily distinguishable from the present case. The reason that these cases are distinguishable is because they all involve the well-settled fundamental right to vote. *See, e.g., Kramer*, 395 U.S. at 627 ("if a challenged state statute grants the *right to vote* to some bona fide residents . . . and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest"); *Harper*, 383 U.S. at 667 ("the political franchise of *voting [is] a fundamental political right*"); *Reynolds*, 377 U.S. at 562 ("the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the *right of citizens to vote* must be carefully and meticulously scrutinized"); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("even the most basic [rights] are illusory if the *right to vote* is undermined").

As such, an extended analysis of these cases is not necessary to reach the conclusion that the Supreme Court decisions cited by the majority involving reapportionment or direct restrictions on the exercise of the franchise all fall within the jurisprudence addressing the fundamental right to vote and not within a broader-based fundamental right to participate equally in the political process. My conclusion is not only supported by the language quoted above, but also represents the traditional view of constitutional commentators and case book authors. *See* Nowak et al., *Constitutional Law*, at 765-76; 3 *Treatise on Constitutional Law* 18.31, at 388-409; *e.g.*, Gunther, *Constitutional Law*, at 787-823; Lockhart et al., *Constitutional Law*, at 1316-56; Rotunda, *Modern Constitutional Law*, at 598-613;

Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 150-52; Kushner, *Substantive Equal Protection*, 53 Mo. L. Rev. at 429-33; Treinman, *Equal Protection and Fundamental Rights--A Judicial Shell Game*, 15 Tulsa L.J. at 195-202.

The fact that the appellees initially claimed before the district court that Amendment 2 would infringe upon the fundamental right to vote, in addition to asserting that Amendment 2 would infringe upon the fundamental right to participate equally in the political process, further buttresses this conclusion. *See also supra* note 12 (recognizing the implicit acknowledgement of the appellees that the fundamental right to participate equally in the political process has not been identified as a fundamental right).

B

In addition to recognizing that any infringement on the fundamental right to vote is subject to the strict scrutiny standard of review under the Equal Protection Clause, the Supreme Court has concluded in a separate line of decisions that regulations involving ballot access may implicate the Equal Protection Clause. The Constitution does not contain any express provision that guarantees individuals the right to become a candidate, and the Supreme Court has never recognized a fundamental right of candidates to be listed on ballots. Nevertheless, the ballot access decisions indicate that heightened, although not strict, judicial scrutiny is required based on a combination of the fundamental right to vote and the First Amendment right of association. *See* 3 *Treatise on Constitutional Law* 18.32, at 411; Galloway, *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. at 152; *e.g.*, *Burdick v. Takushi*, 112 S. Ct. 2059 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Admittedly, the Supreme Court has minimized the extent to which voting rights cases are distinguishable from ballot access cases, *Burdick*, 112 S. Ct. at 2065-66, and the early decisions within this category employed the strict scrutiny standard of review. *See Williams*, 393 U.S. at 30. Notably, however, the Supreme Court's more recent cases clearly indicate that the strict scrutiny standard of review does not apply to ballot access cases. *See Burdick*, 112 S. Ct.

at 2060 (involving the open use of a balancing test); *Anderson*, 460 U.S. at 780 (same).

In *Burdick*, for example, the petitioner characterized the case as a right to vote case rather than as a ballot access case in an attempt to convince the Supreme Court that the strict scrutiny standard of review applied. *Burdick*, 112 S. Ct. at 2065. While recognizing the two different categories of case law, *Burdick* rejected the characterization of the case offered by the petitioner and specifically found that the strict scrutiny standard of review did not apply. *Id.* at 2066. Instead, *Burdick* applied the balancing test that the Supreme Court adopted in *Anderson*.

The decisions cited by the majority falling within the ballot-access category of cases address entirely distinct questions and constitutional problems from the present case and do not apply the strict scrutiny standard of review. As such, any unifying principle linking these cases with decisions from other equal protection categories, is, in my view, attenuated.

C

After citing language from particular equal protection decisions in the ballot access and right to vote contexts, the majority addresses the limited category of cases on which it principally relies as establishing explicit support for the recognition of a fundamental right to participate equally in the political process. *See* maj. op. at 20-28. According to the majority, the equal protection doctrine delineated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and subsequently addressed in *James v. Valtierra*, 402 U.S. 137 (1971), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), supports its conclusion that the Supreme Court has recognized a fundamental right to participate equally in the political process.

In my view, a careful reading of these four cases highlights the fact that they are not fundamental rights cases at all, but instead address potential violations of the Equal Protection Clause based on traditionally suspect classifications, albeit in situations where the ordinary political process has been restructured. *See Citizens for*

Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); *cf.* Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314 (1991) (stating that "[i]n the place of political process theory, the Justices have inserted a very different notion of equal protection--that racial classifications are presumptively unconstitutional because race almost invariably *should be* irrelevant to governmental decisionmaking"); Robert H. Beinfield, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (concluding that racial classifications provided the basis for the heightened level of judicial scrutiny in *Hunter*).

In *Hunter*, the Supreme Court addressed a city charter amendment repealing a racial anti-discrimination ordinance and requiring voter approval before such an ordinance could be enacted. *Hunter*, 393 U.S. at 387. The Supreme Court initially concluded that it "need not rest on *Reitman* to decide" the case before it because "unlike *Reitman*, there was an explicitly racial classification [in *Hunter*]." *Id.* at 389.[13] Nevertheless, *Hunter* characterized the amendment as placing "special burdens on *racial minorities* within the governmental process," *id.* at 391 (emphasis added), and stated:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race, racial classifications are 'constitutionally suspect,'* and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications."

Id. at 391-92 (citations omitted) (emphasis added).[14]

Two years later, in *James*, 402 U.S. at 137, the Supreme Court was asked to apply *Hunter* in a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved the project in a referendum. The federal district court relied on *Hunter* to find that the constitutional measure violated the Equal Protection Clause.

Under the broad reading of *Hunter* dictated by the majority, the federal district court's result should have been affirmed because the measure "involve[d] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters (*i.e.* poor people who would qualify for low-rent housing)." Maj. op. at 18. In its attempt to place boundaries on the expansive fundamental right that it recognizes, limiting language requiring "the presence of an *independently identifiable group* of voters" appears throughout the majority's analysis. *See* maj. op. at 14, 26, 27, 29, 31, 32, 35.[15] For

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[13]*Hunter* did not state that it could not rely on *Reitman* which was decided the previous term, but rather suggested that it did not have to rely on *Reitman* to declare the statute unconstitutional. This conclusion is not surprising given that the cases involved completely different factual settings--one statute that embodied an explicitly racial classification (*Hunter*) and one that did not (*Reitman*).

Amici curiae in this case correctly point out that while *Reitman* plainly involved political participation issues, the Court analyzed it solely as a race case. It is somewhat difficult to explain why the Supreme Court would have relied exclusively on suspect classification grounds in *Reitman* when it could have struck down the statute based on the fundamental right that is today identified and embraced by the majority. In my view, the most logical explanation is that the Supreme Court simply did not recognize such a broad-based fundamental right. This explanation also accounts for the conspicuously superficial treatment that *Reitman* receives in the majority opinion.

[14]Subsequent federal cases addressing *Hunter* characterized the opinion as involving an unconstitutional racial classification. *See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

[15]The basis for the limiting language seized upon by the majority is the Supreme Court's statement in *Gordon* that in contrast to *Hunter*, it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5. While the statement was certainly true in *Gordon*, it was also irrelevant to the equal

example, the majority concludes that just as *Hunter* fenced out an independently identifiable group, so too does Amendment 2 expressly fence out the identifiable group of gay men, lesbians, and bisexuals. Maj. op. at 35.

Under the majority's analysis, the strict scrutiny standard of review therefore should have applied in *James* based on the fundamental right to participate equally in the political process, because *James* involved a group (poor people who would qualify for low-rent housing) that "was 'independently identifiable' apart from the group created by the statute itself." Maj. op. at 27. Just as "[t]he class singled out in *Hunter* was clear--'those who would benefit from laws barring racial, religious, or ancestral discriminations,'" *Gordon*, 403 U.S. at 5, the class singled out in *James* is equally clear--those who would benefit from local agency decisions providing for low-rent housing projects.[16]

Despite these considerations, the Supreme Court did not apply the strict scrutiny standard of review. *James*, 402 U.S. at 143. Instead, *James* found that the strict scrutiny standard of review applied in *Hunter* not because a fundamental right existed and was infringed

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protection analysis, as is evidenced by the fact that such language did not appear in *Hunter*, *James*, or *Washington*.

It is interesting, however, that the district court in this case also attempted to restrict the boundaries of the fundamental right not to have the state endorse and give effect to private biases by employing the same language.

[16]Similarly, just as Amendment 2 precludes gay men, lesbians, and bisexuals from "seeking governmental action favorable" to them, maj. op. at 36, and from enjoying the benefit of local provisions, so too did *James* preclude poor people who would benefit from low-rent housing from seeking governmental action favorable to them and from enjoying the benefit of previously adopted local agency decisions providing low-rent housing projects. Moreover, the constitutional measure adopted in *James* precluded poor people who would benefit from low-rent housing from employing the "normal political institutions and processes," maj. op. at 20, to seek low-rent housing projects by requiring the project to be approved by a majority of those voting at a community election. *James*, 392 U.S. at 138-39.

upon, but because the city charter amendment at issue in *Hunter* affected a traditionally suspect class:

> Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "*special burdens on racial minorities* within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do.

Id. at 140-41 (emphasis added). In this sense, I agree with the majority that *James* is "best understood" as a case where strict scrutiny analysis *did not apply* because the identifiable group challenging the constitutional measure was not recognized as a suspect classification, maj. op. at 28 n.21, and find *James* to be dispositive of the case before us.[17]

In explaining why the constitutional amendment at issue before it did not violate the Equal Protection Clause, however, *James* also cogently explained why *Hunter*, like *Reitman* before it, is "best

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[17]Justice Marshall, joined by Justices Brennan and Blackmun, dissented in *James* on the basis that a suspect classification was involved. Justice Marshall concluded that the constitutional provision at issue was "an explicit classification on the basis of poverty--a suspect classification which demands exacting judicial scrutiny, see *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California, supra.*" *James*, 402 U.S. at 144-45. Justice Marshall's view has never been adopted by the Supreme Court.

In determining whether a group is a suspect or quasi-suspect class, the Supreme Court has identified several criteria to be used. *San Antonio Indep. School Dist.*, 411 U.S. at 1; *see also supra* note 7 (discussing the origin of "discrete and insular minorities" language in footnote 4 of *Carolene Products*). Among others, the Supreme Court has indicated that the immutability of a group's identifying trait should be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *cf. Woodward*, 871 F.2d at 1076 (noting that "homosexuality, as a definitive trait, differs fundamentally from those defining recognized suspect or quasi-suspect classes").

understood" as a case where the strict scrutiny standard of review *did apply* because a traditionally suspect classification was involved. Before the Supreme Court, the appellees in *James* asserted that the mandatory referendum required by the constitutional amendment "hamper[ed] persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142. In this way, an identifiable group was fenced out from the normal political processes. Nevertheless, the Supreme Court specifically rejected the assertion of the appellees that such a restructuring of the political process violated the Equal Protection Clause:

> [O]f course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Id. In my view, the rejection of the assertion of the appellees in *James* weakens, and all but forecloses, the broad reading of *Hunter* offered by the majority.

Less than two months after *James*, the Supreme Court in *Gordon*, 403 U.S. at 1, again distinguished *Hunter* by indicating that the reason the strict scrutiny standard of review was required in *Hunter* was because a traditionally suspect classification was involved. *Gordon* also involved a challenge by a group of interested citizens to a state's constitutional and statutory provisions, which in that case required a sixty-percent approval for any bonded indebtedness incurred by political subdivisions of the state. *Id.* at 2-3.

In rejecting the equal protection claim, *Gordon* stated:

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out *no "discrete and insular*

> *minority"* for special treatment. . . . We are not, therefore, presented with a case like *Hunter v. Erickson*, 393 U.S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear--"those who would benefit from laws barring *racial, religious, or ancestral discriminations.*"

Id. at 5 (emphasis added). As in *James*, the strict scrutiny standard of review did not apply in *Gordon* because the group challenging the constitutional measure could not establish membership in a discrete and insular minority that the Supreme Court recognized as a suspect classification. In this sense, *Gordon* is also "best understood" as a case where strict scrutiny analysis did not apply because a suspect classification was not involved.[18]

In *Washington*, 458 U.S. at 457, the Supreme Court for the first time struck down a statewide initiative based on *Hunter*. Because the initiative was drafted to terminate the use of mandatory busing to achieve racial integration in the Washington public school system, the Supreme Court found that it violated the Equal Protection Clause:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities

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[18]The fact that *Gordon* could not discern any "independently identifiable group or category that favors bonded indebtedness over other forms of financing," while certainly true did not impact on the equal protection analysis. In *James*, where an identifiable group favoring low-income housing clearly existed, the Supreme Court nevertheless declined to apply strict scrutiny analysis because no traditionally suspect classification was involved. *See supra* note 17 and accompanying text.

than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (citations omitted).

That *Washington*'s analysis was driven by the traditionally suspect classification involved in the case is further suggested by its reaffirmation of the principle of *Hunter* that meaningful and unjustified distinctions based on race are impermissible:

> When the political process or the decisionmaking mechanism used to *address* racially conscious legislation--and only such legislation--is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" *James v. Valtierra*, 402 U.S., at 141, quoting *Hunter v. Erickson*, 393 U.S., at 391.

Id. at 485-86.[19]

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[19]My conclusion is further supported by *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), a Supreme Court opinion announced the same day as *Washington* that involved a similar attempt by state voters to restrain busing plans. In *Crawford*, however, the Supreme Court upheld a state constitutional amendment providing that state courts could not order mandatory student assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause. *Id.* at 529.

The petitioners asserted that the constitutional amendment fell within *Hunter* because it employed an "explicit racial classification" and imposed a "race-specific burden on minorities." *Id.* at 536. *Crawford* agreed that if the constitutional amendment employed a racial classification, the strict scrutiny standard of review would apply, but found *Hunter* inapplicable to the case before it because the amendment did "not embody a racial classification." *Id.* at 536-37. In this way, the constitutional amendment in *Crawford* differed from the amendment in *Washington* which embodied an explicit racial classification by reallocating decisionmaking authority in such a way as to make it more difficult for individuals to obtain legislation in their interest because of their race. *See* 3 *Treatise on Constitutional Law* § 18.9(3)(f), at 137; *The Supreme Court 1981 Term*, 96 Harv. L. Rev. 1, 120-30 (1982). The Supreme Court also stressed that having gone beyond

The foregoing review of *Hunter* and its progeny highlights my conclusion that the Supreme Court has never focused on the fundamental right of an independently identifiable group (*i.e.*, poor people who would benefit from low-income housing) to participate equally in the political process. Rather, each of the four cases specifically focuses attention "on the special *burdens on racial minorities* within the governmental process." *See Washington*, 458 U.S. at 458; *Gordon*, 403 U.S. at 5; *James*, 402 U.S. at 141; *Hunter*, 393 U.S. at 391. Because all four decisions were driven by traditional strict scrutiny analysis involving a suspect classification, the fact that the regulations at issue in each occurred within the context of the political process was not dispositive.

D

It is clear that language discussing citizen participation has appeared in a variety of contexts in Supreme Court equal protection opinions addressing the fundamental right to vote, ballot access, and suspect classifications. To date, however, the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review. Nor has the Supreme Court found such a fundamental right within the penumbras of the Constitution. Therefore, I cannot agree with the majority's underlying legal premise that the Supreme Court has recognized such a fundamental right to support the strict scrutiny standard of review in this case.[20]

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the requirements of the Fourteenth Amendment, the state was free to return to the standards of the federal Constitution. *Crawford*, 458 U.S. at 542.

[20]The majority's underlying premise that Amendment 2 violates a fundamental right to participate equally in the political process is also difficult to reconcile with the constitutional and statutory provisions of twenty-one states denying individuals convicted of certain crimes, even if the individual is no longer incarcerated, from being elected to, or from holding public office. *See* Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & Pol. 453 app. A (1988) (listing jurisdictions that specifically disqualify ex-felons from holding public office).

In my view, rather than expressing a willingness to extrapolate new fundamental rights based on selective language from prior Supreme Court decisions, we should exercise caution in identifying and embracing previously unrecognized fundamental rights. *See Bowers*, 478 U.S. at 194-95 (stating that "there should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental"); *Dronenburg*, 741 F.2d at 1396 (stating that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so").

At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process. Such a substantive due process decision would most likely conduct an analysis similar to previous Supreme Court decisions and address the importance of the right, relevant Constitutional provisions, the history and traditions of our country, and whether the right is implicit in the concept of ordered liberty. The fact that such analysis is not present in the Supreme Court precedent cited by the majority cautions against the recognition of such a fundamental right.

I am also troubled by the broad reading given to the Supreme Court cases relied upon by the majority because it is contrary to the underlying principles of *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Under *Hass*, a state court cannot impose a restriction as a matter of federal constitutional law that the Supreme Court has specifically refrained from adopting. *Id.* In *James*, the Supreme Court confronted an equal protection challenge by an identifiable group of persons who had been fenced out by the majority's alteration of their access to the political process. Because *James* explicitly refrained from extending *Hunter* to declare a fundamental right to participate equally in the

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It is hard to imagine any greater form of participation in the political process than serving as an elected or appointed public official. Nonetheless, twenty-one states completely deny this aspect of political participation to the independently identifiable group of previously convicted felons. Notably, none of these provisions have been struck down based on an equal protection challenge for infringing on a fundamental right to participate equally in the political process.

political process when it rejected the appellees' assertion in that case, we are constrained by the principles of *Hass* from doing so now. *See People v. Cisneros*, No. 91SC467, 1993 WL 242337, at *9 (Colo. July 6, 1993) (Erickson, J., concurring) (citing *Hass*, 420 U.S. at 719); *see also DiLeo v. Board of Regents*, 590 P.2d 486, 491 (Colo. 1978) (Erickson, J., dissenting) (only the United States Supreme Court can pronounce the final word on whether the strict scrutiny standard of review or the rational basis standard of review applies). Rather, a straightforward application of *James* indicates that the strict scrutiny standard of review does not apply in this case.

IV

In my view, the district court's underlying legal premise that the Supreme Court has recognized a fundamental right not to have the State endorse and give effect to private biases is erroneous. Similarly, the majority's underlying legal premise that the Supreme Court has recognized a fundamental right to participate equally in the political process is erroneous. Because Supreme Court precedent does not support the evaluation of Amendment 2 under the strict scrutiny standard of review, I would reverse and discharge the entry of the preliminary injunction, and remand for trial on the permanent injunction.

APPENDIX E

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO

Case No. 92 CV 7223, Courtroom 19

REPORTER'S TRANSCRIPT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado and GAIL NORTON as Attorney General of the State of Colorado,

Defendants.

The hearing in this matter commenced on Friday, January 15, 1993, before the HONORABLE H. JEFFREY BAYLESS, Judge of the District Court.

FOR THE PLAINTIFFS:
Ms. Jean E. Dubofsky, Esq.
Ms. Jeanne Winer, Esq.
Ms. Gregory A. Eurich, Esq.
Ms. Darlene M. Ebert, Esq.
Mr. Edward M. Caswall, Esq.
Mr. Joseph N. DeRaismes, Esq.
Mr. David H. Miller, Esq.
Ms. Jane W. Greenfield, Esq.

FOR THE DEFENDANTS: Mr. Timothy M. Tymkovich, Esq.
Mr. John Daniel Dailey, Esq.
Mr. Terrence A. Gillespie, Esq.
Mr. Gregg E. Kay, Esq.
Mr. Mark W. Gerganoff, Esq.
Mr. Jack Wesoky, Esq.

AFTERNOON SESSION, FRIDAY, JANUARY 15, 1993

(The following proceedings were had and entered of record:)

THE COURT: The Court calls 92 CV 7223, Richard Evans, et al, versus Roy Romer, et al.

The record will reflect the appearance of counsel who have been here throughout the week during the presentation of evidence. The matter comes on at this time for the Court to enter its ruling on the two motions for preliminary injunction which have been filed first by the individual plaintiffs in this case and then by the home rule City of Aspen.

The Court is prepared to rule and is going to rule at this time. Before I do that, I want to talk about a couple of things that aren't part of the ruling. Yesterday there was an outburst in the court which the Court felt was inappropriate to the decorum that I want to maintain. And I said so.

Now, in a minute I'm going to rule, and one side is going to perceive that they have won something, and the other side is going to perceive that they have lost something. And that might generate some emotions. And I understand that. As a matter of fact, I suspect there are strong emotions on both sides. And for those who perceive that they have won something, they may want to celebrate. For those who perceive they have lost something, they might want to express disagreement with that, and that's inappropriate in court. I didn't want it yesterday, I don't want it today. But having told everybody what I want, I'm satisfied that this group will abide by the Court's request and maintain the decorum that's appropriate for a courtroom.

Now, the second thing I want to tell you, I decided this about 2:30 this morning. Since that time, with about four hours out to

sleep, I have been writing. And what I've attempted to do is to understand and have my ruling reflect that I know the audience to whom I'm speaking. And I think the audience is made up of two distinct groups. One is a group of legally trained people. That is to say, counsel who have presented this, counsel who have been perhaps inside the bar who may not have presented evidence, and they are familiar with the case law, and they are familiar with the legal concepts, and there will be catch phrases and legal expressions, code I talk in, and they'll understand that. And so a part of it is written for them.

And both sides have told me very fairly, not at this hearing but before, that they anticipate that regardless of what I do, there might be another day and in another higher appellate court that something might be reviewed. So I have written for that audience as well. But I am aware of the interests in this case and the interests in this decision from non-legally trained folks, just the people of Colorado who voted on the Amendment. So what I have attempted to do in writing this is to write at two levels. One for the lawyers and one for the non-lawyers. And I hope not to insult either. And I hope to be clear to both. How well I have succeeded in that will be determined by someone other than me.

Having said those two things, the Court rules as follows: Our form of government is a constitutional democracy, and both of those words have significance. "Constitutional" means our form of government is established by the United States Constitution and by the Colorado Constitution. "Democracy" means what most people think it means, that in most cases the majority rules. Now, let's talk a little bit about that. Historically, the United States Constitution would not have been ratified, if you remember your history classes, unless there had been included the first ten amendments, the Bill of Rights. And the states wouldn't have adopted it without that. So that's how the first ten got there.

Now, in Colorado, for those of you who aren't immediately familiar with our Constitution, it is physically difference in appearance than the United States Constitution. Let me tell you about that. The Bill of Rights to the Colorado Constitution is not a set of amendments. As a matter of fact, the Bill of Rights is right in the body. It is Article II of the Colorado Constitution. Article I is a

one-paragraph geographic description. It says the boundaries of the state start here, and go like this.

The first matter of substance then that is addressed after defining the boundaries is the Bill of Rights in our Constitution. Now, I take that to mean that in Colorado, rights come first. Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as free -- as a free, sovereign, and independent state. And to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

What that says is the majority of citizens can alter the Constitution, it can change. And we have had 29 parts to that Constitution. There are 29 existing articles to Amendment 2 that are the Bill of Rights in Colorado. But in amending that and altering the form of government, even a majority vote of the Colorado citizens cannot violate the constitutional rights of other Colorado citizens.

Now, the issue in question here in this hearing relates to Article II Section 2 of the Colorado Constitution. And it relates to the amendment of that Constitution, the alteration of the State's Constitution by the addition of what was called Amendment 2. Amendment 2 is scheduled actually to become Section 30 of the Bill of Rights here in Colorado. The question raised by the lawsuit asked the court of Colorado whether this amendment violates Article II Section 2 of the Bill of Rights by virtue of being repugnant to the Constitution of the United States. The courts of Colorado are one of the three branches of government under Article III of the Colorado Constitution and are charged with interpreting the Constitution and the laws of the state of Colorado.

Now, the first part of this case is the part we have done this week. And it does not address, and the Court today is not addressing the merits of this case. What will be the final determination will be for another day for full presentation of evidence, full briefing, and full argument. This first part deals with only asking the Court to delay the effective date of the Amendment until such time as that final determination can be made. Such a request is proper, and as a matter of fact, is provided for under the Rules of Civil Procedure,

specifically Rule 65 here in Colorado which allows for preliminary injunctions.

Now, an injunction is a court order which may stop something from happening within a state. This Court is not allowed to base its ruling on a preliminary injunction on its own personal views. Rather, the oath of all Colorado Judges is to support the Constitutions of both United States and of the State of Colorado. And in dealing specifically with preliminary injunctions, the Supreme Court of Colorado has spoken very clearly as to what trial courts are to view in making their decision as to whether injunctions should issue.

I started on Monday, when I introduced this case, by making reference to that case. It's called *Rathke versus MacFarlane*. And if you were here yesterday, you saw that counsel pitched their arguments in terms of the *Rathke versus MacFarlane* standard. That case tells me several things. Let me just brief them. It says, first, that the granting or denial of a preliminary injunction rests in the discretion of the trial court. But then it talks to the trial court as to how it should exercise that discretion. It says these injunctions should not be indiscriminately granted. It says they should only be granted sparingly and cautiously, with the full conviction on the part of the trial court that there is an urgent necessity for the injunction.

Now, the urgent necessity is described by our Colorado Supreme Court as being a threshold. That is to say, if the urgent necessity is not found, the Court doesn't weigh the other six factors. It then says if the threshold, however, is established, then the Court has to weight the six factors that have been discussed. First, that the side seeking the injunction has a reasonable probability of winning the case on the merits.

Now, this calls, admittedly, for some degree of forecast or prediction by the Court as to what may occur in the future. And the Supreme Court recognizes that that's a part of it. Second, it says the Court must consider whether there's a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief. Irreparable injury is defined as injury that cannot be fixed or repaired or adequately compensated perhaps by money.

Third, the Court has to weigh whether or not there is a plain, speedy, and adequate remedy at law, should the preliminary

injunction not be granted. Fourth, the Court must weigh whether granting preliminary injunction will or will not disserve the public interest. Fifth, the Court is directed to address the balance of equities and see if they favor the injunction. Sixth, the Court is directed to consider whether the injunction will preserve the status quo, preserve what exists now, pending a trial on the merits of the case so that things will stay the same. And then the Supreme Court says you can't prove five or four, you have to prove all six. So that's what we are talking about here today, and that is the area in which the Court must base its ruling.

The plaintiffs are individuals and three home rule cities who have asked the Court to delay the effective date. So it is they who bear the burden of proving these things established by *Rathke versus MacFarlane*. They must show the threshold of urgent necessity, and then they must show to the satisfaction of the Court these other six things that have been discussed.

In large measure, the proof which has been offered has been focused on their position that Amendment 2 is repugnant to the United States Constitution. They argue that there's a urgent necessity because of the probability of persons having their fundamental constitutional rights violated for any time period creates an urgent necessity. They argue that the violation of these fundamental constitutional rights causes irreparable harm, and so on, through the six that I have to weigh.

The first one, and perhaps the one that most of the attention has been based on is whether -- has been focused on, rather, is whether there's a reasonable probability of success on the merits. Plaintiffs are attacking the part of the Constitution of the State of Colorado which was passed by a majority vote of the voters November 3, 1992. Because it is a part of the Constitution, they must prove at the final hearing in order to prevail that this Amendment is unconstitutional beyond a reasonable doubt.

Several cases have said it that that's the standard, including *Rathke versus MacFarlane*. That's the highest standard we have in Colorado. That's the same standard as a jury would be asked to consider if someone is guilty of murder in the first degree. Reasonable doubt in Colorado means a doubt based upon reason and common sense which arises from a fair and thoughtful consideration

of all of the evidence or the lack of evidence in the case. It is not a vague, speculative, or imaginary doubt, but it is such a doubt as would cause reasonable persons to hesitate to act in matters of importance to themselves. And so at the hearing on the merits, they will have the burden of proving it beyond such reasonable doubt.

Plaintiffs argue that this Amendment deprives them of fundamental rights guaranteed by the U.S. Constitution. They do not argue that there is a fundamental right to be homosexual or bisexual or lesbian, which is found in the U.S. Constitution. Rather, they argue that the rights they are deprived of are found in the right to equal protection of the laws under the First and 14th Amendments to the United States Constitution.

Specifically, plaintiffs argue that they will be denied the right to vote and the right to petition the government for redress of grievances by the right to have access to the courts. What does the Amendment say? We have had the Amendment on the podium from time to time here. It says, "Neither the state of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities, or school districts shall enact, adopt or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination. This section of the Constitution shall be self-executing."

Plaintiffs produced evidence that the Amendment was only addressed to claim of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.

By doing this, the plaintiffs have attempted to narrow the focus to the claim of discrimination based on homosexual, bisexual, or lesbian orientation. They therefore urge that the Amendment actually and only stands for the proposition in Colorado by Constitutional Amendment is now about to say that there will be no remedy available for acts of discrimination against homosexuals, bisexuals,

and lesbians because those people alone may not go to the government to ask for laws to be enacted or existing laws to be enforced which would prevent that discrimination.

They then point out both by testimony and exhibits that there are existing laws. And they pointed specifically to Section 10-3-1104 having to do with insurance. And that says insurance companies may not discriminate in issuing insurance policies based on sexual orientation. They point out that the executive department has an existing order by virtue of the Governor's Executive Order of December 10, of 1990, which prohibits discrimination based on sexual orientation. They point out from the testimony of the representatives of the home rule cities that these cities may not enact ordinances which may grant remedies for discrimination based on these particular orientations. And they further point out that the three cities which have such ordinances at the present time will be forbidden to enforce them if Amendment 2 becomes effective.

They urge that school districts may not be allowed to remedy any discrimination as to faculty employees or students based on discrimination for homosexuality, bisexuality, or lesbians. In short, the plaintiffs urge that this Amendment, by denying the opportunity to obtain a remedy for discrimination based upon these orientations, has identified a specific group and said that any discrimination as to that group because of membership in that group may not be given relief or remedy by the agencies of the state of Colorado.

It has not said that the state will discriminate against homosexuals, bisexuals, or lesbians, but it has said if any private citizen does discriminate based on such orientation, that no remedy may be provided by the State. Plaintiffs argue this Amendment endorses and gives State-approval as to private discrimination.

Plaintiffs argue that such a State statement endorsing and approving private discrimination deprives them of the right to vote and the right to approach their government; specifically, their courts, for a redress of greivances.

Plaintiffs offer much case authority in support of their position. Many cases from the United States Supreme Court. Such law is received and followed where appropriately applicable by Colorado courts from the United States Supreme Court. Plaintiffs offer several

other cases which are not controlling in Colorado. For example, they offer cases from other states. California, for instance, and from federal courts which are not Supreme Court. That's proper. There's nothing improper about that. They are not saying it is controlling here. They are saying please read this and please review this, we believe there is wisdom to be gained which Colorado might wish to adopt.

Their lead case and where they began, and this was highlighted in the closing argument yesterday, is *Reitman versus Mulkey*. That case involved a question of race in the sale or leasing of rental property.

Let's turn now to the defendants. The defendants, quite rightly, point out that the majority of cases offered by the plaintiffs deal with race, as does *Reitman versus Mulkey*, and not with questions of sexual orientation. The Court notes that defendants are right. That's correct. But the Court also notes it wasn't very surprised by that. And the reason it wasn't very surprised by that is because the history of discrimination law in the United States is based on race. It started with the 14th Amendment which talked about slavery. And most, I will say, of the law has dealt then with the history of discrimination. And so most of these cases do talk about race. Race has a very special place in our legal history. And I think it may well have a small place here.

There has been a suggestion that as a part of Defendant's Exhibit C, one of the things that concerned those proponents of Amendment 2 was that there was urged in one jurisdiction in Colorado that a certain quote preference be given to those with homosexual/bisexual orientation. It was never adopted, but they suggested that perhaps that is what is being addressed by the quota preference which is a part of Amendment 2.

Now, defendants are allowed to present evidence, and defendants are allowed to argue. And they have done both here. But *Rathke versus MacFarlane* does not place any burden of proving anything on the defendants. The burden is always with the plaintiffs who are seeking the injunction. Now, in addition to not having to prove anything here, the defendants have the benefit of something else. Legislation in this case, this is a piece of initiated legislation that will become a part of the Colorado Constitution, is entitled to something

called a presumption of constitutionality, and the Court understands that and gives to that statute a presumption of constitutionality.

That is not to say that the presumption may not be overcome by the presentation of evidence, but the defendants start with that presumption. Defendants then well and fairly argue there are several things here that have been discussed that have been presented that they strongly urge are not part of the case. Mr. Dailey did this very well, really, at the upfront part of his argument yesterday. He said Coloradans for Family Values isn't a party here. He said the Religious Right isn't a party here, nor the Political Right, nor whether Colorado could be deemed a hate state. That's not here, Judge. That's not what you are to decide. And the defendants are correct, and the Court accepts that.

As a matter of fact, I looked at what was presented to the Court in terms of the efforts that have been made on the part of Coloradans for Family Values and the Religious Right and the Political Right. And what I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.

There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

The focus of the defendant's argument was that this is not unconstitutional because all the Amendment attempts to do is to make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals. The argument goes on that the courts should not look to the limitation placed by plaintiffs just on the discrimination but rather look to the

whole Amendment. And they urge that because that demonstrates the true intent of the Amendment. If you isolate on one part, you may not be viewing the true intent and that the Courts should look to the ballot analysis as a type of legislative history, if you will, to demonstrate what that intent was.

The defendants also argue, and they cite the same way, U.S. Supreme Court cases and cases from other courts. They start with *Bowers versus Hardwick*, and they urge that gay, lesbian, and bisexual conduct has been held -- "conduct," now, has been held to be criminal in some states. That case involved a statute outlawing sodomy. And that statute was sustained in *Bowers versus Hardwick* by the United States Supreme Court. And they urge that this behavior which can be criminalized defines the class of people here.

They also argue that a law-making procedure that disadvantages a particular group does not always violate constitutional rights or deny equal protection, and they cite Supreme Court case law for that. The Court agrees with that general statement of the law. They say there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is the heart of Amendment 2.

They urge then that the Court distinguish between certain standards or measures or tests, if you will, as to how you -- how the Court should view an attack on constitutionality. They say this should not be viewed under what is described as the strict scrutiny test but only should be described or analyzed under what's called the rational basis test.

There are the positions which have been taken in summary form by the two sides here. The question is what is the Court to do. First, the Court is ruling on a motion for preliminary injunction only. I am not ruling on the constitutionality of Amendment 2. As a matter of fact, the Court may not at this time rule on the constitutionality of Amendment 2. I may only rule on what is before me, the motion for preliminary injunction.

Second, in ruling, I am following the guidelines that I have outlined from *Rathke versus MacFarlane*. The Court's view is this: In large measure, everything revolves around the first of the six claims. That is -- first of the six elements, excuse me, as to whether plaintiffs have shown evidence and made argument that leads this

Court to conclude that they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt at a hearing on the merits.

Now, some of the six parts are easier to answer on that score than others. For example, the last one is the easiest. Will an injunction preserve the status quo? Yes, of course. Amendment 2 has never been a part of the law of Colorado. It is not now. An injunction will preserve exactly that status. The voters have voted on it. The Secretary of State has certified the vote totals. An injunction will preserve exactly that status.

The others tend to be related to that question that the Court has identified. Is there a danger of real, immediate, and irreparable harm if Amendment 2 becomes effective? Well, if the Court determines that this would be a denial of fundamental constitutional rights, then any denial of fundamental constitutional rights would be real, immediate, and irreparable harm.

Keep in mind where I started. Rights come first in the Colorado Constitution. Bill of Rights is first. The question relates to whether Amendment 2 amounts to a denial of a constitutional fundamental right. Is there a plain, speedy, and adequate remedy at law? Well, once again, it's related to is this probably to be shown to be unconstitutional? The only discussion of potential remedy has been that someone could pass an amendment which repeals Amendment 2. That is a plain remedy. Plain isn't enough. Is it speedy? Clearly not.

There would have to be some effort to get that sort of an amendment on a ballot by legislative action or initiative. Then there would have to be the election process. There's a plain remedy, but it is clearly not speedy. But it does relate, once again, as I have mentioned to whether or not this is a violation of fundamental constitutional rights, or that they have shown that they have a reasonable probability of succeeding on the merits.

Will the granting of a preliminary injunction serve or disserve the public interest? It's tied to whether or not they have established whether they may or may not prevail. The Court finds that the public has no interest whatsoever in having an unconstitutional amendment be added to its Constitution. By the same token, or, if you will, on

the other hand, the State has every interest in having a constitutional amendment become effective if it is not unconstitutional because a majority of the voters voted for it.

Does the balance of equities favor the injunction? It goes back to the same question. Is there an urgent necessity? The urgent necessity is once again tied to whether or not they are liable to prevail. Therefore, the Court concludes that in or order to answer the question as to whether plaintiffs have established the reasonable probability of success, reasonable probability that they will prove this is unconstitutional beyond a reasonable doubt will determine the matter.

What is the state of the law in this Court's view regarding constitutionality of such an amendment? It has been mentioned that the law is not static. It has been mentioned that it evolves. It grows. It changes. And that is true. I'm going to borrow a few words from some Justices of the Supreme Court. It's not about these cases. Not about sexual orientation. It's about the law. It's about the law growing and changing, because I want to put this in a context. Quoting from Mr. Justice McKenna in a case called *Weems versus the United States* from a long time ago, 1910. He said, "The clause of the Constitution in the opinion of the learned commentators may be, therefore, progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

I want to quote from Chief Justice Earl Warren in a 1958 case called *Trop versus Dulles*. He was discussing the 8th Amendment, that's cruel and unusual punishment. It says, "The words of the 8th Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

What is the law on discrimination? What has it been? As I mentioned it started with the 14th Amendment which was for former slaves. It relates to blacks. It related to race. It has been largely dominated by racial cases. The evolution has developed some legal standards, and they were argued yesterday, and I'm going to now discuss those.

One, is that a violation which involves something -- violation of a fundamental right which involves something called a suspect class or a violation which involves a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine. Go on to the next.

A second involves what are described as equal protection violations of fundamental rights. What are fundamental rights? There have been a lot of cases that have discussed those. Fundamental rights have been deemed to include the right to participation in elections. The right of access to the courts. Right of privacy. And even the right of interstate travel. In terms of this issue, the laws which may burden fundamental rights of an independently identifiable group are subject to what is called strict scrutiny of the courts under this equal protection analysis.

That's where the plaintiffs urge the Court ought to come down. Those two prongs. This is a fundamental freedom. This is an independently identifiable group. And therefore, the Court must view this under the strict scrutiny standard. What does that mean? That means a law which burdens any of these fundamental rights of this independently identifiable group will require the state now to show and have a burden that this measure is necessarily related to a compelling governmental interest.

So it changes. They have had all the burden here, but if it were a strict scrutiny standard at the time of hearing on the merits, there would be two standards. One on this side of the room and one on that side of the room. And plaintiffs urge that is the standard I should apply.

The third standard which has been urged in part at least by the defense is called the rational basis test. And that involves laws which may involve not fundamental rights but may be something that's deemed non-fundamental rights in the Constitution, and they are subject only to the test of rational basis. That is to say, the Court is to defer to the legislation if there is any rational relationship between a legitimate public goal to be accomplished and the lines drawn which may accomplish that, even though those lines in the legislation may amount to some degree of discrimination.

The Court concludes with regard to the first that there is a fundamental freedom involved with Amendment 2. The parties themselves have struggled to identify the fundamental freedom. The reason they have struggled, I think, is because they have tried to cast it in the words of prior cases. Let me read you some of those words. I'm going to read you some quotes, and that's always a question as to whether anybody ought to do this, but you have to understand where the Court is coming from because of the law that has come before it.

The first case that the plaintiffs cited is called *Reitman versus Mulkey*. And it was a California case. You haven't read it, but it involved a Section 26 that they passed out there, and it said if you own a piece of property, you can decide if you want to sell it or lease it to anybody, and it's you own decision. That's all it said. The Court said private discriminations in housing were now not only free from prior statutory enactments, but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke constitutional authority, from from sensor or interference of any kind from official sources.

The Court in 1967 by a five to four vote, there are nine justices on the United States Supreme Court, said that was unconstitutional. That involved a fundamental right because what it did was it took this private discrimination and it gave state support to it. But it was five to four in 1967. That means the majority said, yes, and it was the law of the land.

But what happens if we change the members of the Supreme Court? I've told you the law evolves. So let's come forward from 1967. In 1984 there was a Supreme Court case which has been urged to the Court by both sides, as a matter of fact, called *Palmore versus Sidoti*. I don't know if that's how you pronounce it. That's how it looks. This time it was a unanimous decision, nine-zero. And it didn't involve real estate at all. It involved child custody. And the facts of that were that two people who were Anglo had been married, and they had a baby. And then they got a divorce. And in the

divorce, custody of the baby was awarded to the mother. And the mother, who was an Anglo, then took up with a black man. And they ultimately married. And the father who was Anglo went for a change of custody. And basically, the change of custody said my daughter is white, and she will be victimized because there will be bias focused on her because the two people she's living with are of a mixed marriage. One white, one black. That's the context.

The Supreme Court said the question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. Seventeen years before the vote had been five to four. This time it's unanimous. And the Supreme Court says we have little difficulty concluding we are not -- and then it gives a footnote. Sometimes a lot of law is contained in the footnotes, and the footnote says, "In light of our holding based on the equal protection clause, we need not reach or resolve petitioner's claim based on the 14th Amendments of due process clause."

So they are ruling on equal protection which is being raised here. The Court then goes on to say the Constitution cannot control such prejudices. That is, private prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Two years ago in 1991, there was a case which was not from the Supreme Court, it's been urged -- as a matter of fact, it was urged in closing argument by defense. It's called *Pruitt versus Cheney*. Different set of facts. A lesbian was an officer in the Army Reserve. She made a statement which was printed in the Los Angeles Press that said, "I am a lesbian." Based upon that, she was thrown out of the military. They have a regulation, an Army regulation that says they can do that. She brought suit to say that's unconstitutional. And she brought it because she said it's a violation of my right to freedom of speech. The only reason I was thrown out is because I spoke and it got printed in the paper. That's why you threw me out. Not because I'm homosexual.

The Court said no, you were thrown out because of the Army regulation because you are a homosexual, and that had been her claim. But then the Court incredibly said your claim was for violation of First Amendment but you stated facts which may arise --

may amount to a violation of the equal protection clause, and even though you didn't raise it by stating the theory, we are going to let you proceed on that theory which you didn't state. An incredible swing.

It cited the *Palmore* case I just read to you. In *Palmore*, the Supreme Court struck down a denial of custody of a child, based on social disapproval of the interracial marriage, of her daughter. In so ruling, the Court said the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Then it went on to say, *Cleburne*, which is another case, made clear that this principle is not confined to instances of racial discrimination reviewed under strict scrutiny. *Cleburne* was a case of zoning, basically. And it was whether you could put a group home for mentally retarded people within a certain area. And in *Cleburne*, the Court said it is plain that the electorate as a whole, either by referendum or otherwise, could not order city action violative of the equal protection clause.

And then they cite a case called *Lucas versus 44th General Assembly of Colorado*. It's a Supreme Court case. And the city may not avoid the strictures of that clause by deferring to the wishes or objections of some fraction of the bodied politic, and quote *Palmore*, the same language I have quote before.

So the first part has been established, the Court concludes. There is a fundamental right here, and it's the right not to have the State endorse and give effect to private biases.

Second question, is there an identifiable class? Yes. Lot of these cases says it's real hard to find an identifiable class. Not here. The statute itself, the Amendment 2 defines the identifiable class. A lot of these cases say even though it is facially neutral; that is to say, you can sell your property to anybody you want or not sell it to anybody you don't want, this isn't facially neutral. This identifies the class right in the Amendment.

So I find that there is an identifiable class. Now, with regard to the idea that's been argued by defendants that you can't make this an

identifiable class because of *Bowers versus Hardwick*, the Court concludes that this is principally, although, the term "conduct" appears in there, this is principally an Amendment which addresses status, not conduct. Conduct is what *Bowers versus Hardwick* said.

I do that based on a case which was not cited by either side. It's called *Robinson versus California*. That case is a Supreme Court case. That case said you can't make a status a crime even though the conduct is a crime. It had to do with drugs. Can you prevent -- can you say it's a crime to possess drugs? Yeah. Sell them? Yeah. Can you say it's a crime to be addicted to drugs. That's the status. And they said no.

The Court finds that this is a status. Therefore, the Court finds that the burden at the hearing on the merits is going to be twofold. One, the plaintiffs must prove the unconstitutionality of this beyond a reasonable doubt. But two, the Court will look at this under the strict scrutiny standard. And therefore, the State will have to show more than a mere rational basis. They will have to show a substantial and compelling government interest in passing this.

There will be a trial on the merits. The amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That requires strict scrutiny and the two burdens. This will take place in light of what Justice Warren said, "The evolving standards of decency that mark the progress of a maturing society."

Will the plaintiffs win? The Court does not know. Do the plaintiffs have a reasonable probability, given all of this, given all of the law that the Court has examined, do they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt? Yes.

The burdens of *Rathke* have been carried and met by the plaintiffs. The motions for preliminary injunction are granted, and the defendants -- the defendants, the Governor of the State of Colorado and the Attorney General of the State of Colorado are enjoined from declaring Amendment 2 in force, and are enjoined from enforcing Amendment 2 until further order of Court.

This Court is in recess.

(The proceedings were concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter for Division 19, District Court, Denver, Colorado, at the place above set forth.

Dated at Denver, Colorado, January 22, 1993.

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Karen Ann Shain, RPR, CSR

APPENDIX F

AMENDMENT 2 – CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.**

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

-- prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

-- make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

-- "**Civil rights laws**" refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

-- "**Constitutional rights**" refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

-- "**Discrimination**" as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

-- "**Equal protection**" refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

-- "**Political subdivision**" generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

-- "**Protected status**" means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

-- "**Quota**" refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

-- "**Sexual orientation**" means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the areas of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area -- discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships -- in which civil rights laws and policies could **not** be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities -- Aspen, Boulder, and Denver -- have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would

have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a

position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on

the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of

discrimination that these individuals experience is solely connected to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be

applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.

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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

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20

QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in ruling that the Equal Protection Clause of the Fourteenth Amendment prohibits the implementation of a voter-approved amendment to the Colorado Constitution that mandates the exclusion of a specifically identified and targeted minority from participation in the normal processes of government on an equal basis with other citizens.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Proceedings Below	2
Statement of Facts	4
REASONS FOR DENYING THE PETITION	7
I. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT	7
II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW OR CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS	10
III. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS WARRANTING *CERTIORARI* REVIEW	13
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES	
Dunn v. Blumstein, 405 U.S. 330 (1971)	7
Evans v. Romer, 854 P.2d 1270 (Colo. 1993)	1, 3, 7, 12
Evans v. Romer, 882 P.2d 1335 (Colo. 1994)	1, 4
Gordon v. Lance, 403 U.S. 1 (1971)	7, 9, 10, 15
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)	8
Hunter v. Erickson, 393 U.S. 385 (1969)	9, 10, 15
James v. Valtierra, 402 U.S. 137 (1971)	9, 10
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	7
Reynolds v. Sims, 377 U.S. 533 (1964)	7, 8
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	13
Romer v. Evans, No. 93-453, ___U.S.___, 114 S.Ct. 419 (1993)	4
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	8
Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)	9, 10, 15
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	8
Zablocki v. Redhail, 434 U.S. 374 (1978)	12
CONSTITUTIONAL PROVISIONS	
United States Constitution, Amendment XIV	1
Colorado Constitution, Article II, § 2	14
Colorado Constitution, Article II, § 30b	1, 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES/ORDINANCES

Municipal Code of the City of Aspen, § 13-98 2

RULES

Supreme Court Rule 10.1 13

OPINIONS BELOW

The pertinent opinions of the Colorado Supreme Court are reported at 882 P.2d 1335 (Colo. 1994) (on the merits) and 854 P.2d 1270 (Colo. 1993) (preliminary injunction). (See Pet. App. B and D, respectively.) The pertinent opinions of the trial court are not reported, but may be found at Pet. App. C (on the merits) and E (preliminary injunction), respectively.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

Proceedings Below

On November 17, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Municipal Code of the City of Aspen § 13-98 (1977). On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment 2"[1] which was intended to amend the Colorado Constitution so as to effect an immediate repeal of § 13-98 of the Aspen Municipal Code and all other state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian, or bisexual citizens from invidious discriminatory acts. In addition to nullifying existing anti-discrimination protections, Amendment 2 also had the objective of stripping all elected officials and levels of government of their discretion and authority to adopt or enforce future legislation or regulations prohibiting discrimination against homosexual, lesbian and bisexual individuals. In furtherance of that objective, Amendment 2 mandated a fundamental change in the traditional political processes historically utilized by citizens to initiate legislative measures in their interest so as to foreclose the local or statewide adoption of legislation protecting homosexuals and bisexuals from discrimination in employment, housing and public accommodations absent the consent of a majority of the

[1] Article II, § 30b, Colorado Constitution.

Colorado electorate by way of the passage of an amendment to the Colorado Constitution.

On November 12, 1992, Aspen joined with several other parties in initiating litigation in state court challenging the constitutional validity of Amendment 2. Claiming that Amendment 2 violated guarantees to the equal protection of the law as provided under the Fourteenth Amendment to the Constitution of the United States, plaintiffs moved the court for preliminary injunctive relief enjoining the effectiveness of the measure. After a four-day hearing, the trial court entered an order on January 15, 1993 preliminarily enjoining the enforcement of Amendment 2, concluding that the measure infringed upon a fundamental constitutional right and was likely unconstitutional. On January 19, 1993, the petitioners herein appealed the trial court's order to the Colorado Supreme Court, which affirmed on July 19, 1993. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*"Evans I"*) (Pet. App. D). In upholding the injunction, the court found that the right of citizens to participate in the processes of government is a core democratic value and that the opportunity to participate on an equal basis in such processes constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. *Evans I* (Pet. App. at D-9 and D-10). The court further held that inasmuch as Amendment 2 mandated a restructuring of the political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. *Evans*

I (Pet. App. at D-25 to 27). The matter was thereafter remanded to the district court for a trial on the merits, including a determination on whether Amendment 2 was narrowly tailored in support of a legitimate and compelling governmental interest. Petitioners sought *certiorari* review of the Colorado Supreme Court's decision before this Court, which review was denied on November 1, 1993. *Romer v. Evans*, No. 93-453, ___U.S.___, 114 S.Ct. 419 (1993).

Trial was conducted before the state district court on October 12-22, 1993. The evidence and record as developed before the court at the earlier hearing on preliminary injunctive relief was incorporated into the trial record. On December 13, 1993, the trial court entered a written order permanently enjoining the enforcement of Amendment 2, ruling that the measure was not narrowly tailored in support of a legitimate and compelling state interest and that it violated guarantees to the equal protection of the law as provided under the Constitution of the United States. On February 4, 1994, petitioners sought review of the district court's decision before the Colorado Supreme Court which, after a *de novo* review, affirmed the trial court's analysis and findings and the entry of the permanent injunction. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*"Evans II"*) (Pet. App. B).

Statement of Facts

As described in the testimony of the originators and promoters of the measure at trial, Amendment 2 was initiated to fend off alleged militant gay aggression within Colorado and prevent state and local government

from providing homosexuals "protected class status". (Pet. App. C-7) Pursuant thereto, Amendment 2 was designed and specifically intended to dilute and defeat the legal and political ability of homosexuals, lesbians and bisexuals to protect themselves against invidious discrimination. (XV:842-45, 853)

Petitioners offered six "compelling state interests" in support of Amendment 2 at trial: 1) deterring factionalism; 2) preserving the integrity of the State's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing governmental interference with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of children. The trial court rejected all of the petitioners' arguments on these points finding that: 1) deterring factionalism as defined by the petitioners amounted to suppressing political debate and, thus, did not constitute a compelling state interest (Pet. App. C-6); 2) the petitioners failed to demonstrate that the preservation of the State's political functions constituted a compelling interest and, likewise, failed to present any persuasive evidence demonstrating that militant gay aggression existed in Colorado or that the State's political functions were threatened, or that absent Amendment 2 homosexuals and bisexuals would be declared a suspect class and afforded protections based upon that classification (Pet. App. C-8); 3) the petitioners failed to factually support their claim that Amendment 2 would help remedy discrimination against suspect classes by preserving fiscal resources and/or that preserving fiscal resources

constituted a compelling interest (Pet. App. C-9 to 10); 4) the petitioners failed to establish a definition for personal privacy and how Amendment 2 would allegedly protect such right and, similarly, failed to demonstrate that Amendment 2 was narrowly tailored in support of protecting religious freedom and familial privacy (Pet. App. C-12 to 13); 5) no authority existed or was offered by petitioners illustrating that foreclosing government from subsidizing the political objectives of a special interest group constituted a compelling governmental interest (Pet. App. C-13); and 6) that Amendment 2 was not logically related to and did not serve the alleged compelling interest of protecting children (Pet. App. C-13 to 14). On appeal before the state supreme court, petitioners abandoned their previously argued sixth interest in favor of a new and different interest, to wit, that Amendment 2 promoted the interest of allowing people to establish public social and moral norms, including such norms as heterosexual marriages and families and the condemnation of homosexuals and bisexuals as immoral. After a *de novo* review of the several different interests as put forward by the petitioners, both on an individual and aggregate bases, the Colorado Supreme Court affirmed the trial court's ruling in all respects.

Contrary to the assertion as set forth in the petition for *certiorari* (Pet. at 14), the Colorado Supreme Court did not rule that legal distinctions or classifications based upon sexual orientation trigger heightened scrutiny or protection under the Equal Protection Clause. As explained by the court in its initial decision affirming the issuance of the preliminary injunction, it was not the nature of the classification(s) drawn by Amendment 2

that necessitated the court to review the measure under a more stringent level of scrutiny, rather it was the nature of the right invaded and diminished by Amendment 2 that mandated such scrutiny. *Evans I* (Pet. App. D-21 to 23).

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The ruling of the Colorado Supreme Court as challenged by petitioners herein rests entirely upon the prior decisions of this Court which illustrate that the right of citizens to participate on an equal basis in the processes of government is implicit and fundamental in our constitutional system and reflects a core democratic value protected by the Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533, 529 (1964) ("each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies"); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969) ("unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government"); *Gordon v. Lance*, 403 U.S. 1, 5-6 (1971) (when the State identifies and singles out a discrete and independently identifiable group for discriminatory treatment regarding the methods for obtaining access to legislative processes, a right protected by the Equal Protection Clause is implicated); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1971) ("in

decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens . . . ").[2] Consistent with this Court's precedents holding that the Equal Protection Clause applies to all citizens and not just to those who are members of "suspect" classes, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and given the amendment's threatened impact on the rights of the class of citizens targeted therein to participate equally in state and local governmental processes, the Colorado Supreme Court employed strict judicial scrutiny in evaluating the validity of Amendment 2. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31-33 (1973) (test of strict judicial scrutiny required where state's laws interfere with exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution).

Having found first that Amendment 2 infringed upon a protected fundamental right by "fencing out" an independently identifiable minority from the operations of government and, secondly, that the petitioners had failed to demonstrate that the measure was narrowly tailored in support of a compelling state interest, the Colorado

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[2] While the right to vote in state elections is nowhere expressly mentioned in the Constitution, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 664 (1966), and is not, *per se*, a constitutionally protected right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973), it has, nonetheless, been determined to be a fundamental right given the inherent participatory nature and design of our system of representative self-government. *Reynolds v. Sims, supra.*

Supreme Court ruled that the amendment unconstitutionally imposed unique and special burdens on the rights and ability of a singularly targeted minority to participate equally in the State's political and governmental processes and permanently enjoined its effectiveness. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) ("State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 469-70 (1982) (political majority may not manipulate government processes so as to allocate power in nonneutral fashion and impose special and unequal structural burdens upon minority interests); *Gordon v. Lance, supra* at 7 ("fencing out" independently identifiable group from political process violative of equal protection).

The petitioners' request that the Court accept *certiorari* review in this matter on the basis that the decision of the Colorado Supreme Court conflicts with the decision of this Court in *James v. Valtierra*, 402 U.S. 137 (1971) is both unfounded and inaccurate. Unlike the measure before the court below, *Valtierra* involved a state constitutional provision which required voter approval prior to the expenditure of public funds for low rent housing, a provision quite different from Amendment 2 which was drafted and intended to cripple the political participatory rights of an "independently identifiable group".[3] Furthermore, the *Valtierra* decision did not address or rely upon

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[3] In upholding the state constitutional provision at issue in *Valtierra*, the Court found that it "ensures that all the people of a community will have a voice in a decision which may lead to

the *Hunter* doctrine requiring the allocation of political power according to "neutral principles". *Compare, Hunter, supra* at 393-95 (Harlan, J., concurring) and *Washington, supra* at 470. *Valtierra* was decided essentially upon principles relevant to suspect classifications, not fundamental rights. Hence, contrary to the petitioners' assertions of a conflict between the holdings in *Evans* and the prior decisions of this Court, a proper reading of the ruling shows that it reflects a reasoned implementation and enforcement by the Colorado Supreme Court of the controlling constitutional principles laid down in *Hunter, Washington* and *Gordon*. This Court need not revisit those principles.

II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW OR CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

Petitioners assert that in the *Evans* decision, the Colorado Supreme Court in effect determined that sexual orientation defines an "identifiable group" warranting special constitutional protections equivalent to those afforded suspect and/or quasi-suspect classes, including

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large expenditures of local government funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community." (footnote omitted) *Valtierra, supra* at 143. The Court further noted that lawmaking procedures that disadvantage a particular group do not *always* deny equal protection. (emphasis added) *Id.*, at 142.

the application of strict judicial scrutiny to any governmental measure that makes distinctions on the basis of sexual orientation. According to petitioners, the application of strict judicial scrutiny to classifications drawn on the basis of sexual orientation as allegedly called for by the Colorado Supreme Court is in conflict with the decisions of every federal court of appeals that has considered the issue. (Pet. at 14-15) Respondents respectfully submit that the petitioners have mistakenly characterized the Colorado Supreme Court's ruling and that an objective reading of the decision unequivocally shows that the level of review employed by the Colorado Supreme Court in assessing the validity of Amendment 2 was not only proper, but required.

The Colorado Supreme Court reviewed the legal sufficiency of Amendment 2 under the test of strict scrutiny. Contrary to the petitioners' assertion, the application of strict scrutiny review by the court was not based upon a conclusion that sexual orientation defines a protected "identifiable group", or "because it [Amendment 2] bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." Rather, the Colorado Supreme Court employed strict scrutiny review because by expressly and exclusively singling out an independently identifiable group in a non-neutral fashion for exclusion from the normal affairs of government, Amendment 2 directly infringed upon the fundamental right as vested in *all* citizens to participate equally in the political processes that make up our system of self-government:

Prior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation. Thus, like any other member of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others. Were Amendment 2 in force, however, the sole political avenue by which this class could seek such protection would be through the constitutional amendment process. In short, Amendment 2, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution. Amendment 2 must be subject to strict judicial scrutiny in order to determine whether it is constitutionally valid under the Equal Protection Clause. (footnote omitted) *Evans I* (Pet. App. D-27)

As demonstrated above, the Colorado Supreme Court's ruling in *Evans* does not recognize or intimate a new group or class of citizens for special protection under the Fourteenth Amendment, nor does it create or extend heightened standards of judicial review in the evaluation of government measures that draw distinctions based upon sexual orientation. Unlike the factual and legal circumstances that framed the various federal appellate court cases relied upon by the petitioners to illustrate an alleged conflict, Amendment 2 presented the court below with a measure that directly infringed upon a fundamental constitutional right. Because a fundamental right was at stake, the Colorado Supreme Court exercised strict scrutiny review. Such review was not only proper, it was mandatory. *Zablocki v. Redhail*, 434 U.S. 374, 383

(1978) (where a threatened right is of fundamental importance, a critical examination of the state interest offered in support of the challenged classification is required).

In that the Colorado Supreme Court unambiguously applied strict scrutiny review to Amendment 2 on the basis that it threatened a fundamental right and not because it mandated distinctions in the treatment of persons based upon sexual orientation, this Court need not exercise *certiorari* review in this matter so as to resolve alleged conflicts regarding the standard of judicial review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS WARRANTING *CERTIORARI* REVIEW.

Review on *certiorari* is not a matter of right, but of discretion, and may only be granted when there are "special and important reasons" therefor. S.Ct.Rule 10.1; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("special and important reasons" imply problems beyond the academic or episodic). In that the Colorado Supreme Court's ruling below is founded entirely upon established constitutional principles as originally laid down by this Court, respondents respectfully submit that there exists no special or important reason for the Court to grant the petition as sought herein. While the petitioners have set out a frightening parade of horribles allegedly put into

motion by the Colorado Supreme Court's holding, petitioners' fears fundamentally arise from a basic mischaracterization of the decision and not from any error or weakness in the court's legal reasoning or conclusions. Petitioners also overstate the reach of the Colorado court's holding, for although it constitutes an important and meaningful decision, it is, nonetheless, a state and not a federal court decision addressing a state enactment and the manner in which the citizens of Colorado may amend their state constitution.[4] It does not establish controlling precedent relevant to issues or actions that may arise in other parts of the Nation. This Court should not accept the petitioners' invitation to reach out and resolve artificial or anticipated "uncertainties" allegedly spawned by the ruling below, particularly in the absence of any direct conflict between the Colorado Supreme Court's decision and the rulings of this Court or a United States court of appeals.

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[4] Article II, § 2 of the Colorado Constitution proclaims that the people of Colorado may "alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States".

CONCLUSION

For the reasons as set forth above, the petition for writ of certiorari as sought herein should be denied. Alternatively, the Court should summarily affirm the decision of the Colorado Supreme Court on the basis of *Hunter v. Erickson*, *Gordon v. Lance*, and *Washington v. Seattle School District No. 1*.

Respectfully submitted this 10th day of January, 1995.

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(3)

No. 94-1039

In The

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October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

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QUESTION PRESENTED

Whether an initiated state constitutional amendment that forbids the state and all local governments from adopting or enforcing any law or policy protecting lesbians, gay men and bisexuals from discrimination violates the Equal Protection Clause of the Fourteenth Amendment because it burdens the fundamental right of lesbians, gay men and bisexuals to participate in the political process and it fails rationally to advance a legitimate governmental purpose.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. THE DECISION OF THE COLORADO SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISIONS	5
A. The Colorado Supreme Court correctly applied this Court's decisions in *Hunter v. Erickson*, *Gordon v. Lance*, *James v. Valtierra*, and *Washington v. Seattle School District*	5
B. *Evans* is consistent with this Court's jurisprudence protecting rights to political participation	11
II. THE COLORADO SUPREME COURT DID NOT HOLD THAT SEXUAL ORIENTATION IS A "SUSPECT CLASSIFICATION"	14
III. THE DECISION OF THE COLORADO SUPREME COURT PRESENTS NO THREAT TO THE RIGHT OF DEMOCRATIC SELF-GOVERNANCE	15
IV. IT IS PREMATURE TO GRANT CERTIORARI REVIEW OF THE ISSUES RAISED IN THIS CASE	19
V. IF REVIEW IS GRANTED, THIS COURT CAN AFFIRM THE RESULT IN *EVANS* UNDER THE PLAINTIFFS' OTHER EQUAL PROTECTION THEORY	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Celebrezze, 460 U.S. 780 (1983)	13
Avery v. Midland County, 390 U.S. 474 (1968)	6, 7
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	22
E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	10
Equality Foundation of Greater Cincinnati v. City of Cincinnati, 860 F.Supp. 417 (S.D.Ohio 1994); 838 F.Supp. 1235 (S.D.Ohio 1993)	15, 19
Evans v. Romer, 882 P.2d 1335 (Colo. 1994); 854 P.2d 1270 (Colo. 1993)	*passim*
Gordon v. Lance, 403 U.S. 1 (1971)	5, 8, 9, 17, 19
Heller v. Doe, 509 U.S. ___, 125 L.Ed.2d 257 (1993)	22
Hunter v. Erickson, 393 U.S. 385 (1969)	*passim*
James v. Valtierra, 402 U.S. 137 (1971)	*passim*
Kramer v. Union Free School Dist., 395 U.S. 621 (1969)	11
Local No. 438 Construction & General Laborers Union v. Curry, 373 U.S. 542 (1963)	21
Lucas v. Colorado Gen'l Assembly, 377 U.S. 713 (1964)	19
NAACP v. Button, 371 U.S. 415 (1963)	19
New York City Board of Estimate v. Morris, 489 U.S. 688 (1989)	12
Palmore v. Sidoti, 466 U.S. 429 (1984)	22

TABLE OF AUTHORITIES – Continued

Page

Reitman v. Mulkey, 387 U.S. 369 (1967) 19

Reynolds v. Sims, 377 U.S. 533 (1964) 6, 7, 11, 12, 13

U.S. v. Mendoza, 464 U.S. 154 (1984)..... 20

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 22

United States v. Carolene Products, 304 U.S. 144 (1938) 11

Washington v. Seattle School District, 458 U.S. 457 (1982) ..... *passim*

Williams v. Rhodes, 393 U.S. 23 (1968) 11, 13

Yee v. Escondido, 503 U.S. ___, 118 L.Ed.2d 153 (1992) 22

CONSTITUTIONAL PROVISIONS

Colo. Const. art. II, § 2 19

Colo. Const. art. V, § 50 17

Colo. Const. art. XIV, § 3 17

Colo. Const. art. XVIII, § 9 17

Colo. Const. art. XX, § 1 17

Colo. Const. art. XX, § 7 17

U.S. Const. amend. I 20

U.S. Const. amend. XIV 11, 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND ORDINANCES

Section 10-3-1104, 4A C.R.S. (1993 Supp.) 3

28 U.S.C. § 1257 21

Aspen Mun. Code § 13-98 (1977) 2

Boulder Revised Code, §§ 12-1-2 to -4 (1987) 2

Crested Butte Ordinance No. 6 (series 1993) 2

Denver Municipal Code, art. IV, §§ 28-91 to -116 (1991) 2

Telluride Ordinance No. 974 (series 1993) 2

COURT RULES

C.R.C.P. 54(b) 4, 21

Sup. Ct. R. 10.1(a) 15

Sup. Ct. R. 10.1(b) 15

Sup. Ct. R. 10.1(c) 5, 14

OTHER AUTHORITIES

John Hart Ely, *Democracy and Distrust* (1980) 11

Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984) 20

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 344 (7th ed. 1993) 22

OPINIONS BELOW

The opinions of the Colorado Supreme Court (pet. app. B and D) affirming district court rulings in favor of the respondents are reported at 854 P.2d 1270 (Colo. 1993) and 882 P.2d 1335 (Colo. 1994).

STATEMENT OF THE CASE

On November 3, 1992, a majority of Colorado voters approved a state constitutional amendment ("Amendment 2") that provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

The amendment deprives all branches and departments of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions of the state (including counties), municipalities and school districts of the power to remedy "*any* claim of discrimination" based on "homosexual, lesbian or bisexual orientation." Thus, as

amended, the state's basic charter would authorize discrimination against lesbians, gay men and bisexuals in a variety of public and private contexts and immunize such discrimination from regulation or redress at any level of government.[1]

The effect of Amendment 2 is both to repeal existing anti-discrimination laws and policies[2] and to prohibit the future adoption of any similar laws and policies. Among the government enactments that would be repealed by Amendment 2 are the following: the Denver, Boulder, Aspen, Telluride and Crested Butte ordinances prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation, Denver Municipal Code, art. IV, §§ 28-91 to -116 (1991), Boulder Revised Code, §§ 12-1-2 to -4 (1987), Aspen Mun. Code § 13-98 (1977), Telluride Ordinance No. 974 (series 1993), and Crested Butte Ordinance No. 6 (series 1993)[3];

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[1] The state has conceded that the amendment is unconstitutional to the extent that it prohibits lesbians, gay men and bisexuals from litigating in the state courts claims "which could otherwise have been brought by those individuals under federal law." State's Opening Brief, prelim. inj. appeal at 16.

[2] The enactments that would be repealed by Amendment 2 all refer to discrimination on the basis of "sexual orientation" or "sexual preference." Because Amendment 2 addresses only "homosexual, lesbian or bisexual orientation," the enactments would remain valid to the extent that they prohibit discrimination on the basis of *heterosexual* orientation.

[3] While Boulder and Denver, by popular referenda, adopted ordinances prohibiting discrimination on the basis of sexual orientation, the voters of Fort Collins and Colorado Springs rejected similar measures. The Colorado Civil Rights Commission's proposed legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations was not introduced in the General Assembly.

the Boulder Valley School District RE-2 policy that permits students to seek redress for discrimination based on sexual orientation; and section 10-3-1104, 4A C.R.S. (1993 Supp.) of the Colorado Insurance Code, which prohibits discrimination on the basis of sexual orientation in insurance underwriting practices such as the refusal to write health or life insurance for persons who live in certain residential areas, who are engaged in certain occupations, or who designate a non-related individual as an insurance beneficiary.

Amendment 2 also would repeal the policies at Colorado State University, Mesa College and the University of Southern Colorado that protect against discrimination on the basis of sexual orientation; the Governor's Executive Order No. D0035 (December 10, 1990) prohibiting discrimination on the basis of sexual orientation in state employment; and ordinances or resolutions prohibiting discrimination on the basis of sexual orientation in government employment for Aurora, Denver, and Boulder County.

Amendment 2 would prohibit the adoption or enforcement of any future legislation or administrative policies similar to those that it would repeal. As one of the officials of Colorado for Family Values – the group that sponsored Amendment 2 – testified, the purpose of the amendment was "simply [to] close the lid on the entire issue of [civil rights for gays] here in Colorado." Record at 15:853.

On January 15, 1993, the Denver District Court granted the plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2.[4] The Colorado Supreme Court affirmed the preliminary injunction in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), holding that Amendment 2 is subject to strict judicial scrutiny because it "fences out" an independently identifiable class of persons and burdens their fundamental right to participate in the political process. Pet. app. D at 25-27.

After eight days of trial, the district court ruled that Amendment 2 does not serve any compelling state interest by the least restrictive means and permanently enjoined the amendment's enforcement.[5] The court certified its decision as final under C.R.C.P. 54(b) because a number of the plaintiffs' claims remain pending – including the plaintiffs' other equal protection theory, that Amendment 2 did not rationally advance any legitimate governmental purpose, the plaintiffs' claim that the amendment is unconstitutionally vague, and the individual plaintiffs' claims that the amendment violated their right to free expression and association under the First Amendment. The Colorado Supreme Court upheld the

[4] The plaintiffs are lesbians or gay men who had worked to obtain legislation or government policies that protect them from discrimination. The cities of Denver, Boulder and Aspen and the Boulder Valley School District also are plaintiffs.

[5] The district court did not hold that sexual orientation is a suspect classification.

permanent injunction, affirming the district court determination that Amendment 2 does not serve any compelling state interest. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). Pet. app. B.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COLORADO SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISIONS.

Contrary to the contentions of the state, *Evans* correctly applies this Court's precedents. Therefore, there is no inconsistency between *Evans* and this Court's decisions justifying certiorari review pursuant to Sup. Ct. R. 10.1(c).

A. The Colorado Supreme Court correctly applied this Court's decisions in *Hunter v. Erickson*, *Gordon v. Lance*, *James v. Valtierra*, and *Washington v. Seattle School District*.

The state contends that the *Evans* decision misapplies this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), *James v. Valtierra*, 402 U.S. 137 (1971), and *Washington v. Seattle School District*, 458 U.S. 457 (1982).[6] According to the state, these cases "call for strict scrutiny *only*

[6] In *Hunter*, this Court invalidated an initiated Akron, Ohio charter amendment which repealed the city's fair housing ordinance and which provided that any ordinance enacted by the city council dealing with racial, religious, or ancestral discrimination in housing was not to be effective unless approved by a majority of the city voters. In *James*, this Court

when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes." Pet. at 11 (emphasis in original).

The state reaches this conclusion by ignoring this Court's analysis in *Hunter* that contradicts the state's position. The *Hunter* Court noted that "the State may no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. 393 U.S. at 391, 392-393. First, this Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, second, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Id.* In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications

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upheld an initiated provision of the California Constitution which provided that no low-rent housing project should be developed, constructed, or acquired by a state public body until the project was approved by a majority of the community's voters. In *Washington*, this Court invalidated a state initiative which provided that no school board should require any student to attend a school other than the school geographically nearest the student's residence.

but rather classifications that discriminated against urban residents and in favor of rural residents. *Id.*

Although, as the Colorado Supreme Court recognized, *Hunter* speaks clearly to the constitutionality of Amendment 2, the state argues that *Hunter* is simply about "suspect classifications." Pet. at 11. If this were the case, however, it would have been unnecessary for the *Hunter* Court to discuss why participation in the political process is a fundamental right and to cite *Reynolds* and *Avery*: the *Hunter* Court simply could have applied heightened judicial scrutiny based upon the presence of a suspect classification in the challenged law.[7]

The state relies on this Court's decisions in *James* and *Washington* for the proposition that the *Hunter* doctrine applies only to laws containing suspect classifications such as racial classifications. However, the state errs in interpreting *James* and *Washington*. In both cases, this Court indicated that *Hunter* would apply to laws restructuring the political process "nonneutrally" to target members of racial groups. The opinions indicate that some burden on a racial group is *sufficient*, not *necessary*, for the *Hunter* doctrine to apply.

In *James*, this Court refused to strike down a requirement that low-income housing projects – sponsored by

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[7] Even if the holding in *Hunter* were based solely on the fact that Akron's charter amendment involved a racial classification, *Reynolds* and *Avery* stand for the proposition that the right to equal participation in the political process is fundamental and not dependent upon the existence of a racial classification. *See infra*. at 11-14.

the state government and funded by the federal government – be subject to local referenda. The *James* Court found, based on the record in the case, that this referendum requirement did not target any racial group. 402 U.S. at 141. The Court also rejected the contention that the referendum requirement be invalidated simply "because it hampers persons desiring public housing from achieving their objective." According to the *James* Court, "under any such holding, . . . a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group." *Id.* at 142.

James' holding is completely consistent with the *Evans* court's analysis of *Hunter* and does not limit *Hunter*'s application to laws burdening persons on the basis of suspect classifications. As this Court explained in *Gordon v. Lance*, 403 U.S. 1, 5 (1971),[8] decided six weeks after *James*, the *Hunter* doctrine applies only when a law targets some "independently identifiable group." Likewise, the *Evans* court applied *Gordon*'s limitation on the *Hunter* doctrine in holding that the *Hunter* doctrine does not apply to laws unless those laws target groups identified "apart from the group created by the [challenged] statute itself." Pet. app. D at 20. In other words, when a group is defined only by its members' common desire to enact that which the challenged law "hampers," then the

[8] In *Gordon*, this Court upheld West Virginia constitutional and statutory provisions which provide that political subdivisions of the state may not incur bonded indebtedness or increase tax rates beyond those established by the constitution without the approval of 60% of the voters in a referendum election.

group is not identifiable "independently" from the statute being challenged.

Read in light of *Gordon*, *James* held only that "persons desiring public housing" are not an *independently* identifiable group within the meaning of *Hunter* and *Gordon*. Such persons are identifiable as a group only by their desire to enact that which the referendum requirement makes more difficult – government-sponsored low-income housing projects. While, as *James* observed, every referendum requirement "always disadvantages some group," 402 U.S. at 142, the group must be identified by more than its opposition to the referendum requirement for the group to be identifiable independent from that requirement.

Racial groups are indeed independently identifiable: they are defined by their members' common characteristics that exist apart from the desire to enact what a referendum requirement – such as *Hunter*'s ban on fair housing legislation – makes more difficult to achieve. However, contrary to the state's assertion, just because racial groups constitute an independently identifiable group does not imply that racial groups or other suspect classifications are the only groups that are independently identifiable. As *Gordon* explains, a group is "independently identifiable" whenever its members are united by some common characteristic that is not simply created by the referendum requirement that the individual members are united in opposing.[9] 403 U.S. at 5.

[9] The relevant "independently identifiable group" is the group whose needs the government is barred from addressing.

In short, because the law challenged in *James* did not involve any targeting of an *independently identifiable* group, it did not fall within the scope of *Hunter*. By contrast, in this case there is no dispute that (1) Amendment 2 was enacted to express disapproval and limit the rights of gays, lesbians, and bisexuals and (2) gays, lesbians, and bisexuals are identifiable by characteristics other than a desire to enact that which Amendment 2 makes more difficult to enact. Therefore, unlike the law in *James*, Amendment 2 falls within the scope of *Hunter*, and the Colorado Supreme Court in *Evans* properly construed *Hunter* to require strict judicial scrutiny of Amendment 2.

In *Washington*, 458 U.S. 469-70, this Court endorsed Justice Harlan's statement that the state may not create a political structure that deliberately excludes targeted groups from an opportunity to influence the political process. This Court stated that "[w]hen the State allocates governmental power *non-neutrally*," such allocations of power violate the Fourteenth Amendment. *Washington*, 458 U.S. at 470 (emphasis added).

Of course in *Washington*, 458 U.S. at 470, the Court noted that the state had violated the requirement that the political process be neutral by "explicitly using the racial nature of a decision to determine the decision-making process." However, nothing in *Washington* suggests that the government "allocates power non-neutrally" *only* when government enacts a racial classification. Rather,

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Hunter, 393 U.S. at 393 ("the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote") (underlining added); *Washington*, 458 U.S. at 468, 472, 476.

this Court stated that Washington restructured its political process "non-neutrally" because it did not "place obstacles in the path of everyone seeking to secure the benefits of governmental action." 458 U.S. at 470. Such "fencing out" of only one group in the political process is precisely what Amendment 2 accomplishes.

B. *Evans* is consistent with this Court's jurisprudence protecting rights to political participation.

The state also takes issue with *Evans'* reliance on this Court's decisions concerning the fundamental right to political participation. *See Reynolds*, 377 U.S. 533; *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Hunter*, 393 U.S. 385. According to the state, the *Evans* court erred in inferring from these cases that the Fourteenth Amendment protects a fundamental right to participate in the political process. Instead, the state contends that these cases protect no more than the right to cast an equally weighted ballot and to be free from certain arbitrary ballot access restrictions.

The state's narrow view of this Court's precedents ignores the unique protection this Court has afforded the right to political participation, and not merely particular instances of that right. *See generally* John Hart Ely, *Democracy and Distrust* (1980); *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). As this Court noted in *Reynolds*:

> "representative government is in essence self-government through the medium of elected representatives of the people, and each and every

> citizen has an inalienable right to *full and effective participation in the political process* of this State's legislative bodies."

377 U.S. at 565 (emphasis added). Since *Reynolds*, this Court has several times reaffirmed its holding that the fundamental right involved is a fundamental right to equal access to the process of self-government, most recently in *New York City Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989).

Amendment 2 bars enactment and enforcement at all levels of state and local government of "any" laws or policies that might benefit or protect gay, lesbian and bisexual persons. The barrier to political participation is the requirement that only a majority of the voters of the state[10] can provide gays, lesbians and bisexuals relief from discrimination in a municipality or enact a protective policy in a school district.[11] Indeed, the state admits that the purpose of Amendment 2 is to exclude even debate or discussion of "gay rights" from all public, political fora in Colorado in order to express disapproval toward lesbians, gays, and bisexuals. Record at 15:839,

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[10] A state constitutional amendment that would repeal or supersede Amendment 2 must be referred to the state electorate by the state legislature or by petition containing valid signatures of registered electors in an amount equal to 5% of the total number of votes cast for secretary of state.

[11] *See Washington*, 458 U.S. at 483 (the Washington initiative transferred local "decision-making authority . . . [to] a new and remote level of government"). In contrast, the initiative in *James* protected local decision-making, requiring that federally-funded public housing be approved by a majority of the voters in the community where it would be located.

853; affidavit of John Finnis at ¶¶ 16, 17. Such a ban on one group's interest from consideration is not different in kind from exclusion of a single political party's program from the ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787, 793 (1983); *Williams*, 393 U.S. at 30-31.

Moreover, Amendment 2 is far broader than the laws that this Court struck down in *Hunter* and *Washington*. Unlike the laws at issue in those cases, Amendment 2 does not merely burden attempts to enact a specific law, such as a fair housing law or a school desegregation plan; rather, Amendment 2 burdens "any statute, regulation, ordinance or policy" intended to protect or benefit lesbians, gay men or bisexuals.

In sum, Amendment 2 has an undisputed discriminatory purpose and a dramatic discriminatory effect on the ability of gay, lesbian and bisexual persons to represent their interests before state and local government in Colorado. The state argues that the amendment's barrier to political participation is permissible so long as the government preserves all constituents' right to cast an equally weighted ballot. However, the right to cast a ballot does not provide "full and effective participation in the political process," *Reynolds*, 377 U.S. at 565, when the representatives elected by the ballot are constitutionally forbidden from acting to protect the civil rights of the burdened constituency. Burdening a group's ability to advance legislation in its interests undermines the process of representative government just as effectively as diluting or otherwise restricting the votes of that group. The Fourteenth Amendment forbids "sophisticated as well as simple-minded modes of discrimination" in the political process. *Reynolds*, 377 U.S. at 563. Therefore,

Evans correctly held that Amendment 2 deprives the plaintiffs in this case of a fundamental right of political participation within the meaning of *Hunter*. *Evans* is consistent with this Court's precedents and is not worthy of certiorari review under Sup. Ct. R. 10.1(c).

II. THE COLORADO SUPREME COURT DID NOT HOLD THAT SEXUAL ORIENTATION IS A "SUSPECT CLASSIFICATION."

The state contends that *Evans* is inconsistent with several decisions by federal courts of appeal holding that sexual orientation does not constitute a suspect classification. This is incorrect. The *Evans* court did not reach the issue of whether sexual orientation constitutes a "suspect" or "quasi-suspect" classification. Pet. app. B at 6, n.3. Indeed, the trial court rejected the plaintiffs' "suspect classification" theory. Since alternative theories supported their equal protection claim, the plaintiffs did not appeal the trial court's ruling to the state supreme court. *Id.*

The state, however, contends that the practical effect of *Evans* makes sexual orientation a suspect classification. Apparently, the state maintains that any legal classification on the basis of sexual orientation in Colorado will be subjected to strict judicial scrutiny under *Evans*.

This contention is wrong. If the state were to enact new laws putting other, special burdens on lesbians, gay men and bisexuals, the standard of review would not be governed by *Evans*. *Evans'* requirement of strict judicial scrutiny applies only when a law like Amendment 2 bars the normal governmental bodies from considering *any*

legislation intended to benefit or protect gay, lesbian or bisexual constituents. Therefore, because *Evans* neither expressly nor implicitly makes sexual orientation into a suspect classification, *Evans* is consistent with all decisions of federal appellate courts, and such alleged inconsistency cannot be the basis for certiorari review in this case. *See* Sup. Ct. R. 10.1(b).

Indeed, the only federal court to apply *Hunter* to a law similar to Amendment 2 has reached a decision identical on that issue to the decision of the Colorado Supreme Court in *Evans*. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 860 F.Supp. 417 (S.D.Ohio 1994); 838 F.Supp. 1235 (S.D.Ohio 1993). If anything, the unanimity of courts concerning the application of this Court's precedents to laws like Amendment 2 suggests that the petition for certiorari review ought to be denied. *See* Sup. Ct. R. 10.1(a)-(b).

III. THE DECISION OF THE COLORADO SUPREME COURT PRESENTS NO THREAT TO THE RIGHT OF DEMOCRATIC SELF-GOVERNANCE.

The state contends that *Evans* will disrupt democratic decision-making and "inject[ ] the judiciary into a broad range of issues heretofore reserved for state legislatures or to Congress." Pet. at 16. This contention also lacks merit and does not provide a basis for granting certiorari review.

At the outset of its argument, the state correctly notes that *every* law will affect some persons more than others and that every law affects some identifiable group of persons – namely, the group of persons defined by the

statute. For instance, a state-wide speed limit for motor vehicles may be described as singling out all drivers who exceed the speed limit. However, the holding of *Evans* is limited to cases in which the law "fences out" a group that can be identified independently of the law being challenged. The limit on *Evans'* holding underscores the essential principle that the equal protection clause of the Fourteenth Amendment forbids the exclusion of *persons* from the political process, not the preemption of *issues*.

This principle strikes the proper balance between the right of the majority to engage in democratic self-government and the right of all persons to participate in the political process. Persons are not excluded from political participation simply because they fail to secure a majority of votes on a single issue: political loss is a necessary part of the political process, in which different factions contend for different government measures, sometimes winning and sometimes losing, but are never excluded totally from the process of presenting proposals for consideration by democratic institutions. *Hunter*, 393 U.S. at 393-94.

All five of the constitutional provisions cited by the state in support of its contention, pet. at 16-19, preempt *issues*; they do not exclude any *independently identifiable group*. Indeed, the state's five examples indicate that Amendment 2 is unique in its total exclusion of one constituency from *all* political fora in Colorado.

For instance, Colorado's constitutional term limit excludes the incumbents of *all* factions and parties equally: it fences out no particular group, nor does it

target any particular constituency. To use Justice Harlan's words in *Hunter*, a limit on terms

> obviously does not have the purpose of protecting one group to the detriment of all others. It will sometimes operate in favor of one faction; sometimes in favor of another.

393 U.S. at 393-94.

As the state notes, term limits prevent "supporters of particular incumbents," pet. at 18, n.12, from re-electing their preferred candidates. However, this group – "supporters of particular incumbents" – is not *independently* identifiable: like supporters of particular types of bonded indebtedness, one "can discern no independently identifiable group" that favors incumbency as such. *Gordon*, 403 U.S. at 5.

Of course, a term limit has a disparate impact on the aggregate of all persons who wish to re-elect incumbents. But these persons are not identifiable independent of their desire to accomplish what the challenged provision forbids. The group, therefore, is not "independently identifiable" – that is, identifiable as a group independent of its members' opposition to term limits.

A similar analysis applies to all of the other state constitutional provisions cited by the state. In each case, the "group" affected is defined by nothing more than its members' support for legislation prohibited by the constitutional provision. *See* Colo. Const. art. V, § 50 (restrictions on state funding of abortions); art. XIV, § 3 and art. XX, § 1 (restrictions on annexation by Denver); art. XVIII, § 9 (restrictions on locations where gambling is legal); art. XX, § 7 (limitation on structure of Denver school district).

In no case does the cited provision deliberately single out a specific constituency having an identity that transcends a narrow political controversy and bar normal political institutions from considering *any* laws or policies intended to benefit that constituency. These provisions burden a group that is defined only by support of the forbidden program or law; they do not exclude an independently identifiable group from participation in the political process.

By contrast, Amendment 2 singles out in its text a group of persons – "homosexuals, lesbians, and bisexuals" – who comprise a group independent of any shared interest in enacting what Amendment 2 forbids. Lesbians, gay men, and bisexuals are identifiable as a group by their sexual orientation, a trait that is unrelated to the existence of anti-discrimination laws or Amendment 2. *See* testimony and exhibits addressing the genetic and social origins of sexual orientation, 13:242-338, 371-427; 14:468-91.

It would be difficult to imagine a more deliberate exclusion of an independently identifiable group's interests from consideration in the political process. By the same token, however, *Evans* provides no basis for the extension of its principles to laws other than those that are similar to Amendment 2.

Prohibiting legislative, judicial, or executive protection of a group's civil rights uniquely burdens the group's participation in the political process. Such a drastic curtailment of effective political participation prevents a constituency from using the democratic process to protect itself from majoritarian excesses.

The decision in *Evans* reflects a continuing theme in this Court's jurisprudence: courts should not be reluctant to overturn the will of the people if its expression is unconstitutional. *See, e.g., Hunter,* 393 U.S. 385; *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Lucas v. Colorado Gen'l Assembly,* 377 U.S. 713 (1964); *NAACP v. Button,* 371 U.S. 415 (1963); *see* Colo. Const. art. II, § 2 (the people of Colorado may "alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States").

IV. IT IS PREMATURE TO GRANT CERTIORARI REVIEW OF THE ISSUES RAISED IN THIS CASE.

Evans is consistent with this Court's decisions in *Hunter, Gordon, Washington,* and *James.* However, even assuming *arguendo* that the application of these precedents were less clear, it would be premature to resolve the application of these precedents by granting the state's certiorari petition to review this case.

Only two courts have discussed the application of *Hunter* to Amendment 2 or a similar law – the Colorado Supreme Court and a federal district court in the Southern District of Ohio. The rulings by the Ohio federal court in *Equality Foundation* are pending before the United States Court of Appeals for the Sixth Circuit.[12] To grant

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[12] The federal district court in *Equality Foundation* ruled on all of the plaintiffs' federal constitutional challenges, determining that the Cincinnati initiative violated the plaintiffs' equal protection rights to participate in the political process, that the

certiorari review of the Colorado Supreme Court's decision would deprive this Court of potentially valuable discussion of these issues by lower courts.[13] *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984) (This Court benefits from "permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (This case "exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals."); Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 715-19, 719 n.146 (1984) (describing "affirmative value" of allowing legal issues to "percolate" in lower courts before being resolved by U.S. Supreme Court).

The federal question in *Evans* does not require such hasty resolution by this Court. No *federal* policy is affected by *Evans*, and the Colorado Supreme Court decision does not bind other state or federal courts. At most,

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initiative's classification is suspect, quasi-suspect and not rationally related to a legitimate state purpose, that the initiative violates the First Amendment, and that the initiative is unconstitutionally vague.

[13] According to the state, "at least fourteen other States were considering sponsoring measures similar to Amendment 2" in 1993 and 1994. Pet. at 20. Sponsors of the initiatives in most of the states did not obtain the required signatures to place the initiatives on the ballot. The two state-wide initiatives that were before the voters in November 1994 – in Oregon and Idaho – were defeated. The only similar anti-gay rights initiative that passed in 1994 is a charter amendment that bars the Alachua County, Florida commissioners from adopting laws that create sexual orientation classifications.

Evans enjoins one state law. If the state is correct that this issue will come up in other states, this Court will have ample opportunity to review the federal question without prematurely foreclosing lower court development of the law.

Moreover, if this Court reverses the decision of the Colorado Supreme Court, the case must be remanded to the district court to rule on the plaintiffs' remaining federal constitutional claims. The state courts have issued a final judgment on only one of the plaintiffs' federal claims, a single equal protection theory alleging a deprivation of a fundamental right to political participation under the Fourteenth Amendment. The trial court certified its resolution of this claim to the Colorado Supreme Court under C.R.C.P. 54(b). The plaintiffs' other federal claims remain pending before the trial court, and there is no final judgment on these non-certified claims under 28 U.S.C. § 1257. Were this Court to reverse *Evans*, it would have to remand the case for further state court proceedings on the remaining federal claims. In short, there will be no way of avoiding piecemeal federal review if this Court grants certiorari and reverses the state ruling. *See e.g. Local No. 438 Construction & General Laborers Union v. Curry*, 373 U.S. 542, 550 (1963).

V. IF REVIEW IS GRANTED, THIS COURT CAN AFFIRM THE RESULT IN *EVANS* UNDER THE PLAINTIFFS' OTHER EQUAL PROTECTION THEORY.

If this Court grants review, the Court can affirm the Colorado Supreme Court's decision by considering the

plaintiffs' other equal protection theory: that Amendment 2 does not rationally advance a legitimate governmental purpose. *See Yee v. Escondido*, 503 U.S. ___, 118 L.Ed.2d 153, 169-70 (1992); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 344, 374 (7th ed. 1993) ("As a general rule, the respondent has the right to urge any argument in support of the judgment of the lower court, including contentions either rejected or not passed upon by the court below.") The district court did not rule on the plaintiffs' argument that Amendment 2 fails to rationally advance any legitimate governmental purpose. The plaintiffs, however, presented the rational relationship argument to the Colorado Supreme Court, arguing that Amendment 2 served neither the compelling interests advanced by the state nor any legitimate purpose.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *Heller v. Doe*, 509 U.S. ___, 125 L.Ed.2d 257, 269-71 (1993); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985). The plaintiffs contend that the provisions of Amendment 2 and the campaign materials distributed throughout the state by the amendment's supporters demonstrated antipathy toward lesbians, gay men and bisexuals. Antipathy arising out of hostility or groundless stereotypes is not a legitimate purpose justifying a law under the equal protection clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). If this Court grants certiorari review of the decision of the Colorado Supreme Court, it

should direct the parties to address the plaintiffs' argument that Amendment 2 is not rationally related to a legitimate purpose.

CONCLUSION

The state's petition for certiorari should be denied. For the reasons set out at pages 5-11, *supra.*, the state's request that this Court summarily reverse the Colorado Supreme Court decision under *James* also should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

REPLY BRIEF OF PETITIONERS

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	5, 9
Gordon v. *Lance*, 403 U.S. 1 (1971)	3
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	2
Holt Civic Club v. *Tuscaloosa*, 439 U.S. 60 (1978)	1
Hunter v. *Erickson*, 393 U.S. 385 (1969)	1, 3
James v. *Valtierra*, 402 U.S. 137 (1971)	2, 3
Kramer v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)	5
Luther v. *Borden*, 48 U.S. 1 (1849)	2
Maher v. *Roe*, 432 U.S. 464 (1977)	7
Reynolds v. *Sims*, 377 U.S. 533 (1964)	1
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973)	2, 4, 5, 7
Sugarman v. *Dougall*, 413 U.S. 634 (1973)	2, 8
U.S. Terms Limits, Inc. v. *Thornton*, Nos. 93-1456 and 93-1828 (cert. granted June 20, 1994)	10
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)	2, 3
Williamson v. *Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955)	7, 10

REPLY BRIEF OF PETITIONERS

The decision below permanently enjoins the State of Colorado from enforcing the decision of its citizens to limit the authority of their government in an area left open by the Constitution, *i.e.*, whether to grant *extra*-constitutional protections to homosexuals. To justify this extraordinary action, the court below created an expansive new "fundamental right" entitling "any independently identifiable group" to invoke strict federal judicial scrutiny of such state decisions. That right goes well beyond anything this Court sanctioned in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *Reynolds* v. *Sims*, 377 U.S. 533 (1964), or their progeny.

Respondents do not dispute that those cases—the *only* cases in which this Court has ever refused to accord the traditional presumption of constitutionality to a State's fundamental decisions structuring its own government—all involved suspect racial classifications or burdens on the fundamental right to an equally weighted vote. Respondents concede that they cannot defend the decision below on either of those traditional grounds for heightened scrutiny. Opp. 14-15. And respondents do not deny that in recognition of "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them," *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978), this Court has rejected every previous effort to expand the scope of strict scrutiny in this context.

In seeking to avoid certiorari, respondents are thus left to argue that the expansion worked below is insignificant. Respondents insist that their new "fundamental right to equal access to the process of self-government," Opp. 12, will not invite widespread federal intrusion in state government operations, because it is available to only a subset of citizens—members of "independently identifiable groups." *Id.* at 15-19. The Court need look no further than respondents' strained efforts to define narrowly these "independently identifiable groups," however, to see that

under the decision below "a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group." *James* v. *Valtierra*, 402 U.S. 137, 142 (1971). Respondents' briefs merely reinforce the clear need for this Court's review of the decision below.

1. "Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 44 (1973). That tension is at its zenith where, as here, the challenged decision involves a State's discharge of its "constitutional responsibility for the establishment and operation of its own government," and this Court has consistently recognized that equal protection "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (citations omitted).[1]

In arguing that this Court's decisions in *Hunter* and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), can be read to sanction strict federal scrutiny of *any* state decision allocating authority among political subdivisions that "burdens" an independently identifiable group, respondents completely ignore—as they must—this established constitutional respect for state autonomy. Respondents also ignore that both *Hunter* and *Seattle School District* repeatedly stress that it was suspect racial classifications, *not* fundamental rights, that

[1] *See also Gregory* v. *Ashcroft*, 501 U.S. 452, 461-63 (1991) (acknowledging the "unique nature of state decisions that go to the heart of representative government," and noting that "while the Equal Protection Clause provides a check on such state authority, our scrutiny will not be so demanding") (internal quotations and citations omitted); *Luther* v. *Borden*, 48 U.S. 1, 47 (1849) ("[T]he sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure").

triggered strict scrutiny.[2] Indeed, neither case even mentions, much less defines, any such fundamental right.[3]

Any doubt on this issue is fully resolved by *Valtierra*, in which, as respondents concede, this Court affirmed an otherwise indistinguishable "referendum requirement [that] did not target any racial group," Opp. 7, noting, "[t]he present case could be affirmed only by extending *Hunter, and this we decline to do.*" 402 U.S. at 141 (emphasis added). The "any particular group" phrase had meaning in *Hunter* v. *Erickson*, 393 U.S. 385 (1969) only because of the suspect class context, and *Valtierra* clarifies that it is limited to that context. Expanding it beyond suspect classes gives this "right" a breathtaking sweep that warrants review by this Court.[4]

[2] *See, e.g., Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 477 n.18 (1982) ("The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests"); *id.* at 480 n.23 ("[W]hat we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking"); *id.* at 485-86 n.29 ("It is the State's race-conscious restructuring of its decisionmaking process that is impermissible"); *id.* at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century—that 'the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race' "); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969) ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . . racial classifications are 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' ") (internal citations omitted); *id.* at 391 ("§ 137 places special burdens on racial minorities within the governmental process").

[3] Respondents place great emphasis on the fact that *Hunter* twice cites *Reynolds* and another voting rights case. In both instances, however, the Court (using *cf.* citations) merely noted that directly burdening a suspect class "is *no more permissible* than denying them the vote, on an equal basis with others." *Hunter*, 393 U.S. at 391 (emphasis added); *see also id.* at 393.

[4] Respondents' heavy reliance on *Gordon* v. *Lance*, 403 U.S. 1 (1971), is puzzling. The Court there rejected *both* approaches

Respondents' attempt to fit the lower court's decision within this Court's fundamental "right to vote" cases is also unavailing. Although respondents' exhaustive search of the case law produced snippets of expansive dicta concerning the unquestioned *importance* of political participation, they failed to uncover a single decision recognizing a *fundamental constitutional right* in this context that extends beyond the right to have one's *vote* counted equally.

In this regard, respondents' willingness to embrace the "essential principle that the equal protection clause of the Fourteenth Amendment forbids the exclusion of *persons* from the political process, not the preemption of *issues*," Opp. 16, is revealing. Amendment 2 preempts the electorate's representatives on only a narrow set of *issues*—whether homosexuals will receive extra-constitutional benefits or protections. No *persons* are excluded from anything. Those who favored the substance of respondents' position—the vast majority of whom were *not* homosexuals—had an equal vote on Amendment 2. After Amendment 2 homosexuals in Colorado have exactly the same right to vote in *all* elections and referendums as every other citizen. And after Amendment 2 homosexuals, like other citizens, can lobby their representatives on all issues not directly resolved by the people in Amendment 2.

Amendment 2 is merely a substantive decision by Colorado citizens on the scope of the laws their government may enact. That respondents disagree with that decision does not mean that the Constitution grants them a right to see it reversed. To the contrary, this Court has been quite careful to explain that the Constitution guarantees only *access* to the ballot, not outcome. See, *e.g.*, *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35 n.78 (1973) ("Since the right to vote, *per se*, is not a constitutionally

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that respondents urge here—extending the *Hunter* doctrine beyond suspect racial classifications, *id.* at 7, and expanding the ballot *access* cases to state actions that merely make "it more difficult for some kinds of governmental actions to be taken," *id.* at 5-6—in *affirming* a single issue supermajoritarian vote requirement.

protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population"); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969) ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not").

Rhetoric aside, the fundamental right recognized by the Colorado Supreme Court is a *new* right.[5] That alone warrants immediate review by this Court, since as this Court has recognized, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986) ("There should be, therefore, great resistance to expand the substantive reach of [the Fourteenth Amendment], particularly if it requires redefining the category of rights deemed to be fundamental"); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33 ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws").

2. *Any* judicial creation of fundamental constitutional rights is cause for profound concern by this Court. Accordingly, respondents go to great lengths to assure the Court that the lower court confined the scope of its new fundamental right by limiting access to that right to members of "independently identifiable groups." In so arguing, respondents, like the court below, hopelessly conflate the narrow—and independent—"fundamental rights" and

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[5] Unlike respondents, the lower court candidly conceded as much. Pet. App. D-14 (noting that this Court's voting rights cases "are distinguishable from the present controversy," but discovering a "common thread" justifying a broader right against "unequal burdens on identifiable groups").

"suspect classifications" exceptions to the traditional presumption of constitutionality that attaches to States' laws. Under existing constitutional theory, any state action burdening individuals' fundamental rights triggers heightened scrutiny, regardless of the identity of the persons whose rights are burdened. By contrast, a state classification that burdens a suspect class triggers strict scrutiny regardless of the issues involved. Combining the two concepts into a "fundamental right" that triggers heightened scrutiny only for the new "suspect class" of "independently identifiable groups" is unprecedented.

As respondents' briefs make clear, it is also unworkable and can only lead to intrusive federal review of any state efforts to restructure political subdivisions or to reallocate authority between the people and their representatives. Indeed, respondents' constitutional theory would seemingly invalidate *all* decisions made directly by the people precisely and only because such decisions by definition prevent representatives—a lower governmental authority—from making a different decision.

Respondents' assurance that limiting strict scrutiny to *independently* identifiable groups will quiet this revolution in equal protection jurisprudence is no more than sleight of hand. Respondents argue, for example, that Colorado's constitutional term limit provision burdens only "persons who wish to reelect incumbents," a group respondents contend is "not identifiable independent of their desire to accomplish what the challenged provision forbids." Opp. 17. It takes little creativity, however, to note that incumbents themselves are burdened by that provision (and are indeed its target). As respondents explain it, a group is "independently identifiable" and thus entitled to strict scrutiny "whenever its members are united by some common characteristic that is not simply created by the referendum requirement that the individual members are united in opposing." Opp. 9-10. The group of incumbents is independently defined by its members' positions as political officeholders, and is thus an "independently identifiable group."

Of course, it may be the case that not all members of the group of incumbents favor unlimited political careers. That argument proves too much, however, because respondents have not shown that *all* homosexuals favor quotas, preferences, or other governmental intrusions in private decisionmaking. Nor can they even show that a majority of the opponents of Amendment 2 were homosexual, even assuming, *arguendo*, that homosexuals comprise more than 2-3% of the general population. Thus, the only real "group" burdened by Amendment 2 is the 46.6% of Coloradans that voted against it. See Pet. App. B-2. As respondents would be quick to point out, however, *that* group is one of the few that is *not* "independently identifiable."

Indeed, it is difficult to imagine a referendum requirement that would *not* burden some independently identifiable group. State referenda outlawing prostitution, casino gambling, or drug use would be subject to strict scrutiny as burdening the "rights" of the independently identifiable groups of prostitutes, gamblers and drug users, respectively, to ask their representatives to sanction those activities. State licensing of doctors would trigger strict scrutiny because it deprived the independently identifiable group of doctors of their "right" to seek laxer standards from lower political subdivisions. But see *Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955). A state ban on smoking in public places would be subject to strict scrutiny because it "fenced out" smokers from the local political process. A state constitutional requirement that school financing be based upon property taxation would trigger strict scrutiny because it "targets" the independently identifiable group of children in relatively poor districts. But see *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). And a State that barred legislative consideration of government funding of abortions would burden the "right" of the independently identifiable group of indigent women to demand such benefits. But see *Maher* v. *Roe*, 432 U.S. 464 (1977). Viewed realistically, the decision below essentially eliminates the

ability of the people of a State to limit the legislative goals of their representatives.[6]

3. Throughout their briefs in opposition, respondents resort to characterizations of the effects of Amendment 2, of the "state's motivations" in enacting Amendment 2, and of the scientific evidence relating to the genetic and social origins of sexual orientation, that are as erroneous as they are irrelevant. Thus, respondents are simply wrong in asserting that Amendment 2 would "authorize" discrimination against homosexuals in "state employment" or that it would "immunize" public discrimination "from regulation or redress at any level of government." Opp. 2. Amendment 2 does not repeal the Equal Protection Clause of the Fourteenth Amendment, and homosexuals, like everyone else, remain free to challenge government discrimination. All that Amendment 2 does is reserve to the people the decision whether, *unlike* most individuals, homosexuals are deserving of *more* protections or *greater* benefits than the general populace.[7] And the question

[6] *Cf. Sugarman* v. *Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road").

[7] Respondents also claim that the "state admits that the purpose of Amendment 2 is to . . . express disapproval toward lesbians, gays, and bisexuals." Opp. 13. The State admits no such thing. The testimony and affidavit respondents cite in support of their claim in fact make clear that the witnesses held exactly the opposite view. Record at 15:839, 853 ("Q. What sorts of legal protections did you believe existed after Amendment 2 had passed and [was] implemented? A. Well, the right to petition, the right to lobby politically, the right to conduct business, the right to freely associate, every right that has been recognized as fundamental to every citizen"); Aff. of John Finnis ¶ 15 ("The standard modern position is consistent with the view that . . . it is unjust for A to impose any kind of disadvantage on B simply because A believes (perhaps correctly) that B has sexual inclinations (which B may or may not act on) towards persons of the same sex"). In any event, Amendment 2 was passed not by the "state," but by a majority of the *voters*, and there is no evidence that in making it more difficult for homosexuals to obtain *special* treatment, these voters intended to express "disapproval" of homosexuals.

whether homosexuals *are* deserving of special protections is simply irrelevant here because, as respondents concede, this is *not* a suspect class case.[8]

The decision below must be defended, if at all, on its holding that *all* "independently identifiable groups" have a fundamental constitutional right to determine which political subdivisions will consider the issues important to them. It is unsurprising that respondents prefer to divert attention from that issue. At bottom, the decision below has transformed an internal state political battle into a federal constitutional war. A group with substantial political power, see Pet. App. C-18, exercised that power in a general election and attracted nearly 47% of the State's voters to its position. It ultimately lost the election, but no individual was denied the right to participate fully in the political process. The process constitutionally available to respondents to alter Amendment 2 is the same as that which brought it into existence in the first place—the will of the people expressed through the ballot box. The decision below, however, grants respondents—and every other "group" that loses a political battle—a constitutional "right" simply to demand that the offending decision be undone. Because that new "right" directly threatens state autonomy and places into constitutional doubt all attempts by state (*or* federal) governments to preempt lower governmental powers, the decision below plainly is worthy of review by this Court.

[8] In their zeal to run away from the suspect class inquiry, respondents also highlight the absurdity of a constitutional scheme that would subject a State's efforts affirmatively to harm homosexuals—even to the point of criminalizing homosexual conduct—to only rational basis scrutiny, but would subject that State's decision *not* to grant homosexuals special benefits unavailable to the general populace to strict scrutiny. *See* Opp. 15 ("If the state were to enact new laws putting other, special burdens on lesbians, gay men and bisexuals, the standard of review would not be governed by *Evans*"). *Compare Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986).

4. Finally, there is no legitimate reason not to review this critically important issue now. The decision below—affirming the trial court's entry of a *permanent* injunction barring the enforcement of Amendment 2—is unquestionably final; unless this Court grants review, Amendment 2 is dead. Nor does the fact that this unprecedented federal constitutional ruling was issued from a state supreme court, rather than a federal court, see Opp. 22, justify delay. Indeed, under respondents' theory there could be no review of state supreme court decisions invalidating state constitutional amendments on federal constitutional grounds. But see, *e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, Nos. 93-1456 and 93-1828 (cert. granted June 20, 1994).[9] The issue raised here is simply too important and too far-reaching to postpone the inevitable day when it must be resolved by this Court.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[9] The fact that the decision below has deterred efforts by other States to enact limits on their representatives' ability to grant extra-constitutional protections to homosexuals is a reason to grant, not deny, review of the case. In any event, the holding below granting new fundamental rights to "any identifiable group" has importance well beyond the narrow context of homosexual rights.

[10] As respondents concede, their "other equal protection theory"—that Amendment 2 fails rational basis scrutiny—can be addressed here. Contrary, to respondents' claims, however, Amendment 2 easily passes rational basis scrutiny. *See, e.g., Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (Courts cannot in the name of the Constitution overturn duly enacted state constitutional provisions simply "because they may be unwise, improvident, or out of harmony with a particular school of thought").

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No. 94-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
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vs.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES

in support of the *Petitioners*

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Colorado for Family Values (CFV), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action to present arguments stating why the petitioners' request should be granted. This request is based on Rule 10.1(c) of the Supreme Court of the United States.

CFV spent thousands of dollars and innumerable hours in obtaining the passage of the Colorado state constitutional amendment at issue. CFV is in a unique position to illustrate the gravity of the Colorado Supreme Court's decision and its national significance.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, and the Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: The City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
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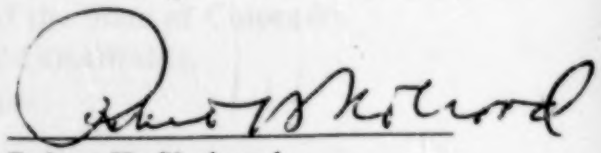
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: The City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.



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Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES viii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions & Its Settled Equal Protection Jurisprudence 4

A. The Decision Below Conflicts With *San Antonio Independent School District v. Rodriguez* 4

B. The Decision Below Conflicts With *Hunter v. Erickson* 9

II. The Decision Below Presents A Significance Federal Question Regarding The Right Of The People To Limit The Power Of Their Elected Representatives By Constitutional Means 11

III. The Colorado Supreme Court's Decision Imperils Federal & State Legislation 13

IV. The Right Of The People To Address The Issue Of Homosexual Rights By Amendment To Their Fundamental Law Is At Stake 15

CONCLUSION 18

CASES — PAGE(S)

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) 17

Bernal v. Fainter, 467 U.S. 216 (1984) 14

Board of Educ. of the Westside Community Schs. v. Mergens, 496 U.S. 226 (1990) 1

Bolling v. Sharpe, 347 U.S. 497 (1954) 9

Bowers v. Hardwick, 478 U.S. 186 (1986) 8, 14

Dandridge v. Williams, 397 U.S. 471 (1970) 4, 5, 8

Dunn v. Blumstein, 405 U.S. 330 (1972) 4

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F.Supp. 1235 (S.D. Ohio 1993) 17

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F.Supp. 417 (S.D. Ohio 1994) 17

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct., Jan. 15, 1993) 13

Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) 5-7, 9, 11, 14, 15

Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980), *cert. denied sub nom., Antry v. Flores*, 449 U.S. 875 (1980) 17

Gordon v. Lance, 403 U.S. 1 (1971) 7, 10

Habron v. Epstein, 412 F.Supp. 256 (D. Md. 1976), *aff'd.*, 429 U.S. 802 (1976) 17

Hall v. Pennsylvania State Police, 570 F.2d 86 (3rd Cir. 1978) 17

CASES — PAGE(S)

Hunter v. Erickson, 393 U.S. 385 (1969) 4, 7, 9, 11

James v. Valtierra, 402 U.S. 137 (1971) 7, 10

Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971), *cert. denied*, 405 U.S. 999 (1972) 17

Korematsu v. United States, 323 U.S. 214 (1944) 9

Lindsey v. Normet, 405 U.S. 56 (1972) 4, 8

Lucas v. Forty-Fourth General Assembly of Colo., 377 U.S. 713 (1964) 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12

Planned Parenthood of Southeastern Pennsylvania v. Casey, 60 U.S.L.W. 4795 (1992) 16

Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) 17

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 4

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 4, 5, 7-9

Shapiro v. Thompson, 394 U.S. 618 (1969) 4

Skinner v. Oklahoma, 316 U.S. 535 (1942) 4

Upshaw v. McNamara, 435 F.2d 1188 (1st Cir. 1970) 17

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 7, 11

CONSTITUTIONS AND CHARTERS **PAGE(S)**

U.S. Const. art. I, § 10, cl. 1 13

U.S. Const. amend. I 14

U.S. Const. amend. X 13

Colo. Const. art. II, § 30b (Amendment 2) 2

Fla. Const. art. 1, § 3 14

N.Y. Const. art. XI, § 3 14

Cincinnati, Ohio, Charter, art. XII 17

RULES

U.S. Sup. Ct. R. 12 3

U.S. Sup. Ct. R. 13 3

OTHER AUTHORITIES **PAGE(S)**

Anti-Gay Rights Group Submits Petitions To Force Referendum, Sun-Journal (Lewiston, Me.), Aug. 23, 1994 16

Gay-Rights Fight Takes National Stage, Conservative Groups See 'Clash Of Two Belief Systems,' Seattle Times, May 29, 1994 16

Letter from Kelly Walton, Chairman, Idaho Citizens Alliance (ICA) to ICA friends (Dec. 1994) (Heyburn, Idaho) 16

National Group May Join Gay-Rights Fight, Gainesville Sun, Nov. 12, 1994 16

Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905 (1993) 16

OCA (Oregon Citizens Alliance) *Looks To Next Ballot Issue*, Statesman Journal (Salem, Or.), Nov. 10, 1994 16

Petitioners' Pet. for Writ of Cert., *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *pet. for cert. filed*, (U.S. Dec. 12, 1994) (No. 94-1039) 13

Summary of 1994 Anti-Gay/Lesbian/Bisexual Ballot Initiatives, National Gay & Lesbian Task Force Policy Institute, (Washington, D.C.) July 12, 1994 15

The Washington Blade, Jan. 28, 1994 15

INTEREST OF AMICUS

Colorado for Family Values (CFV) is the grassroots organization which initiated and campaigned for the passage of Colorado's Amendment 2. The opponents of the constitutional amendment out-spent CFV almost 2 to 1 which required CFV to rely heavily on citizen volunteers. During the campaign the Denver television market which covers approximately 75 percent of the voters in Colorado refused to run CFV's advertisements. Despite this, CFV gathered approximately 85,000 signatures to place Amendment 2 on the ballot and hand-delivered over 700,000 information sheets about the amendment. When the voters of Colorado passed Amendment 2 the political pundits were astounded. Thus, CFV is naturally concerned about the continued vitality of Amendment 2.

CFV believes that states have the power to pass a wide variety of laws to protect the family and public morality. CFV desires to protect the integrity of our constitutional system of government by ensuring the sovereignty of the people.

The National Legal Foundation, CFV's counsel, assisted in drafting the language of Amendment 2 and participated as amicus curiae in this litigation at the state court level. The Foundation has participated as amicus curiae in several federal and state cases and served as lead counsel in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for amicus curiae is Robert K. Skolrood, the Foundation's Executive Director and General Counsel. Mr. Skolrood is licensed to practice in Illinois, Oklahoma, Virginia, and the District of Columbia, and is admitted to practice before the U.S. Supreme Court and numerous U.S. Circuit Courts of Appeal and District Courts.

STATEMENT OF THE CASE

On November 3, 1992, the people of Colorado, by popular initiative, passed by a vote of 813,966 to 710,151 (53.4% to 46.6%) Amendment 2 to the State Constitution. This amendment denied to the state and its political subdivisions power to enact any law "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships" would "be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." Colo. Const. art. II, § 30b (Amendment 2).

On November 12, 1992, Respondents filed suit in state district court seeking to enjoin the enforcement of Amendment 2. The trial court granted a preliminary injunction on the ground that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

On appeal, the Colorado Supreme Court affirmed. It held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." The Colorado Supreme Court concluded that Amendment 2 must be subject to the "strict scrutiny" test.

To satisfy strict scrutiny the trial judge assessed each interest proffered by Petitioners to determine if it was compelling and, if so, whether Amendment 2 was the least restrictive means to further that interest. The trial judge found none of the interests specified by Petitioners to be compelling enough to justify a constitutional amendment denying to state and local officials discretion to enact laws giving heightened protection to homosexuals, lesbians, and bisexuals. Consequently, the judge entered an order permanently enjoining the enforcement of Amendment 2. Petitioners appealed.

On appeal, the Colorado Supreme Court, conducted a de novo review. The court found compelling state interests. However, the high court concluded that Amendment 2 was not the least restrictive means to secure those interests. Having concluded that Petitioners "failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way," the state supreme court "affirm[ed] the trial court's entry of a permanent injunction barring its enforcement."

Pursuant to Rules 12 and 13 of the U.S. Supreme Court, Petitioners have now filed a petition to this Court for review on writ of certiorari. This brief amicus curiae is filed on behalf of Colorado for Family Values in support of the Petitioners.

REASONS FOR GRANTING THE PETITION

This Court should grant the requested petition for the following reasons.

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions And Its Settled Equal Protection Jurisprudence

The decision of the Colorado Supreme Court conflicts with the decisions of this Court in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), and in *Hunter v. Erickson,* 393 U.S. 385 (1969). Moreover, it departs significantly from this Court's definitive guidelines limiting the protection of "fundamental rights" under the Fourteenth Amendment's Equal Protection Clause.

A. The Decision Below Conflicts With San Antonio Independent School District v. Rodriguez

Prior to *Rodriguez* this Court found a number of fundamental rights entitled to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Among these were the right of procreation, *Skinner v. Oklahoma,* 316 U.S. 535 (1942), the right to travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), the right to vote, *Dunn v. Blumstein,* 405 U.S. 330 (1972), and the right to engage in First Amendment activities, *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972).

Such rights, this Court held, could not be infringed by state law except upon proof of a compelling interest and further, upon proof that such interest could not be adequately protected by any other means. *See, e.g., Shapiro,* 394 U.S. at 634, 637. During this same period, however, the Court refused to find a number of other rights to be "fundamental" within the meaning of the Fourteenth Amendment's Equal Protection Clause. Among them were the right to public welfare assistance, *Dandridge v. Williams,* 397 U.S. 471 (1970), and a right to adequate housing, *Lindsey v. Normet,* 405 U.S. 56 (1972). As to these rights the Court held that they could be denied if the state could show a "rational"

basis for doing so. *See Dandridge*, 397 U.S. at 487.

In the *Rodriguez* case, this Court faced the question whether education was like the right to vote, a fundamental right subject to strict scrutiny, or like the right to public welfare assistance, subject to rational basis review. The Court concluded that education, like welfare, was not a fundamental right, and therefore, was subject only to the rational basis test. In the process of making this decision, this Court laid down two definitive guidelines for assessing future fundamental rights claims under the Equal Protection Clause of the Fourteenth Amendment.

First, the Court stated that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 411 U.S. at 33. Thus, the Court laid to rest any notion that the Fourteenth Amendment's Equal Protection Clause gave authority to the Court to devise substantive equality rights based upon political, economic, or social assessments. *Second*, the Court limited "fundamental rights" to those which are found, explicitly or implicitly, in some provision of the constitution *other than the Equal Protection Clause of the Fourteenth Amendment itself. See id.*

The Colorado Supreme Court did not even cite *Rodriguez*, much less apply its definitive guidelines to determine if the right to participate equally in the political process is protected either explicitly or implicitly in a constitutional provision other than the Fourteenth Amendment's Equal Protection Clause. To the contrary, the Colorado court posited as its starting point a statement of political philosophy:

> The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time.

Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*).

The court made no effort whatsoever to demonstrate that this premise was derived from any right, either explicitly or implicitly guaranteed in the Constitution. To the contrary, the court found this right of political participation in two very different sources, a book written by a law professor and a student note in the Harvard Law Review. *Evans I*, 854 P.2d at 1276. Yet, this presupposition of political participation infected the rest of the court's opinion, especially its review of this Court's equal protection precedents.

First, this misconstruction drove the court's wide-ranging discussion of the right to vote cases. After admitting that all of "those decisions addressed entirely distinct questions and constitutional problems from those presented here,"[1] the court still derived an overarching principle from those cases to apply to the case before it:

> [W]hile all three categories of [voting] cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process . . . .

Evans I, 854 P.2d at 1279.

Had the Colorado court paid attention to this Court's decision in *Rodriguez*, it would have recognized that this is the very kind of reasoning rejected by the first prong of the *Rodriguez* formula. *The Fourteenth Amendment's Equal Protection Clause does not, itself, create any substantive constitutional rights.*

1 *Evans I*, 854 P.2d at 1278.

The court below also disregarded *Rodriguez's* second prong. It did not search the Constitution to find whether it contained a right to participate equally in the political process. Rather, it turned to another line of equal protection cases and recast them to fit its preconceived philosophy of political participation.

Specifically, the Colorado court picked up *Hunter v. Erickson*, 393 U.S. 385 (1969) and its progeny (cases involving this Court's suspect class/equal protection analysis)[2] and wrongly characterized them as cases "involv[ing] legislation which prevent[] the normal political institutions and processes from enacting particular legislation *desired by an identifiable group of voters*." *Evans I*, 854 P.2d at 1279 (emphasis added). By recasting these cases to fit the court's political terminology, the court below was able to come up with its new fundamental right of equal participation in the political process.

This kind of analysis was explicitly rejected by this Court in *Rodriguez* as wholly inappropriate to the definition of a fundamental right for equal protection purposes. In *Rodriguez*, the appellees' attempted to characterize the right to an education as a fundamental right by claiming it was essential to two already recognized fundamental rights, freedom of speech and the right to vote. The essence of the appellees' argument was this: Education must be considered a fundamental right because without an education one cannot be an effective participant in the marketplace of ideas nor can one be an informed and intelligent voter. *Rodriguez*, 433 U.S. at 35-36.

2 *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

The Court explicitly rejected this kind of approach to the fundamental rights question for two reasons. First, it smacked of political, not legal analysis, and therefore was outside the province of the Court. *Rodriguez*, 433 U.S. at 36. Second, it was "difficult to perceive" the "logical limitations" to plaintiffs' "nexus theory." *Id.* at 37. How, the Court asked, could education be distinguished from "the significant personal interests in the basics of decent food and shelter?"[3]

> Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most *ineffective participants in the political process*, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams and Lindsey v. Normet . . . .

Rodriguez, 433 U.S. at 37 (citations and footnote omitted) (emphasis added).

If the Colorado Supreme Court's assessment of political effectiveness is allowed to stand as the foundation of a fundamental right, it will encourage future litigation and allow the courts to use it to demonstrate that identifiability and political powerlessness justify rulings that would ensure the poor's fundamental right to participate equally in the political process. The decision, then, poses a direct threat to this Court's limits on the fundamental rights/equal protection doctrine as stated in *Dandridge* and *Lindsey*, and authoritatively explained in *Rodriguez*.

Moreover, the Colorado decision will encourage litigants and courts to open the door once again to create substantive constitutional rights "having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Such fabrications threaten the very integrity of this Court and encroach upon matters left by the Constitution to other branches of the government or

3 *Rodriguez*, 433 U.S. at 37.

to the states. It was for these reasons that this Court limited the fundamental rights/equal protection doctrine in *Rodriguez*. *Rodriguez*, 411 U.S. at 29-33. This Court should not allow the Colorado Supreme Court to open a door that it has shut to itself.

B. The Decision Below Conflicts With Hunter v. Erickson

The Colorado Supreme Court ignored *Rodriguez* and the limits it placed on the fundamental rights/equal protection doctrine, while claiming that *Hunter* established a fundamental right to participate equally in the political process. *Evans I*, 854 P.2d at 1279. By construing *Hunter* as a fundamental rights case, the Colorado Supreme Court has placed itself in conflict with this Court's limited application of *Hunter* to cases involving race.

In *Hunter*, this Court struck down a voter enacted charter amendment preventing the city of Akron, Ohio from "implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron." *Hunter*, 393 U.S. at 386. This Court in *Hunter* rested its conclusion not on the fundamental rights strand of equal protection, but upon principles rooted in the suspect classification soil of the Fourteenth Amendment:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny,"

Hunter, 393 U.S. at 391-92 (citations omitted) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) and *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

Two years later this Court *twice* refused to extend *Hunter* beyond its racial context. One case involved a constitutional amendment requiring low-income housing developments to be approved by a majority of

voters. The other case concerned a state constitutional provision requiring approval by sixty percent of the people in a referendum election before a state subdivision could incur bonded indebtedness. In both cases, this Court explained that *Hunter* did not apply because the discrimination was not based on race. *James v. Valtierra*, 402 U.S. 137, 140-41 (1971); *Gordon v. Lance*, 403 U.S. 1, 5 (1971).

Eleven years later, this Court applied the *Hunter* precedent, but it did so in a case involving a constitutional amendment limiting the ability of local school boards to achieve racial balance in public schools. Once again this Court emphasized the impact that the limitation had on an identifiable racial minority, thereby triggering the "strict scrutiny" standard applicable to "suspect classifications" under the Fourteenth Amendment's Equal Protection Clause. Justice Blackmun made this point again and again in his majority opinion:

> In our view, Initiative 350 must fall because it . . . . uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities.
>
> . . . [D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. . . .
>
> . . . .
>
> . . . The initiative removes the authority to address a racial problem--and only a racial problem--from the existing decisionmaking body, in such a way as to burden minority interests. . . .
>
> . . . .
>
> . . . [T]he charter amendment at issue in Hunter dealt in explicitly racial terms . . . giv[ing] rise to an impermissible racial classification. . . .
>
> Hunter . . . rested on a principle that has been vital for over a century--that "the core of the Fourteenth Amendment is the prevention of meaningful

and unjustified official distinctions based on race."

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470-71, 474, 485-86 (1982) (citations omitted).

Notwithstanding these crystal clear statements, the Colorado Supreme Court held that "the principle articulated in [*Hunter* and *Washington*] clearly is not one that can logically be limited to the 'race' context alone." *Evans I*, 854 P.2d at 1281 (footnote omitted). The only reason that the Colorado Supreme Court could make this statement is that it had already made up its mind that there was a fundamental right to participate equally in the political process and thus was forced to put forth some case from this Court as standing for that proposition. *Id.* at 1276. *Hunter* was the best it could do, and yet *Hunter* clearly stands for exactly the opposite proposition.

This kind of tendentious reading of this Court's precedents is simply indefensible. Such abuse of judicial power must be quickly checked lest other courts follow the Colorado Supreme Court's revisionist view of the *Hunter* and *Washington* precedents. The strict scrutiny test, designed to protect bona fide suspect classes, could be invoked by every ill-defined, self-identified group that claims that it has a constitutional right in order to press its political agenda before a state legislature or local government council.

II. The Decision Below Presents A Significant Federal Question Regarding The Right Of The People To Limit The Power Of Their Elected Representatives By Constitutional Means

Just over 30 years ago, this Court had before it a case from Colorado presenting the question whether the Fourteenth Amendment's Equal Protection Clause prohibited the people of the state of Colorado from establishing only one branch of its state legislature on the basis of population. *Lucas v. Forty-Fourth General Assembly of Colo.*, 377 U.S. 713 (1964). That case presented to this Court the important federal question whether the Court's newly-minted "one-person, one-vote" rule

would apply even when a majority of the people by popular referendum determined to adopt a bicameral legislative body patterned after the United States Congress.

The issue in this case is just as significant as the one in *Lucas*. This time the people claim the right to deny to their elected representatives the power to enact legislation that a particular political interest group wants. The interest group, in turn, has claimed that the Equal Protection Clause of the Fourteenth Amendment prohibits the people from placing such a constitutional limitation on their elected representatives.

As in *Lucas*, the power of the people is once again being challenged as violative of the Fourteenth Amendment's Equal Protection Clause. And, as in *Lucas*, it should be this Court, not some lower court, that should decide whether that Clause will now be constituted to limit the people's "original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness . . . . " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

What was said by District Judge H. Jeffrey Bayless at the beginning of the Amendment 2 trial still rings true now.

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied . . . for the passage of the Amendment . . . .
>
> There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been

> involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998, at 73,837 (Colo. Dist. Ct., Jan. 15, 1993). *See also,* Petitioners' Pet. for Writ of Cert. at E-10, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *pet. for cert. filed*, (U.S. Dec. 12, 1994) (No. 94-1039).

Unfortunately, Judge Bayless' insightful observation did not impact his own decision-making.

Nonetheless, the right of the people to limit the power of their representations by a written constitution is a fundamental principle of American government. That right is reserved to the people of each state by the Tenth Amendment of the United States Constitution, except where specifically prohibited by that federal document.

From the beginning of the American republic, the people of each state have limited the powers of their own governments by written constitutions. In addition, the people of the United States have limited the powers of the States in the United States Constitution. The very purpose of some of these limitations is to remove a number of subjects from the ordinary political processes in the States. *See, e.g.*, U.S. Const. art. I, § 10, cl. 1.

III. The Colorado Supreme Court's Decision Imperils Federal & State Legislation

The Colorado Supreme Court's marriage of fundamental rights cases and suspect class cases has given birth to a constitutional nightmare. If this "marriage" is not "annulled" by this Court, its consequences will reverberate throughout the nation. As other state and federal courts

adopt the perilous analysis of the court below, innumerable federal and state statutes, state constitutional provisions, and municipal ordinances and charter provisions -- whose validity was previously unquestioned -- will be subject to strict scrutiny.[4]

The court below contends that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Evans I*, 854 P.2d at 1282 (footnote omitted). If this is true, "the courts will be very busy indeed." *Bowers*, 478 U.S. at 196. Application of the Colorado Supreme Court's novel principles to a sampling of constitutional provisions will illustrate this point.

The First Amendment to the U.S. Constitution provides, "Congress shall make no law respecting an establishment of religion."[5] The New York State Constitution provides, "Neither the state nor any subdivision thereof, shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination."[6] The Florida State Constitution provides, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[7]

Applying the novel analysis of the court below, all such provisions would be subjected to strict scrutiny. Any number of religious groups would qualify as an independently identifiable class apart from the amendments in question. The establishment clauses fence out of the political process religionists in general and more specifically, to name a

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4 "Only rarely are statutes sustained in the face of strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984).

5 U.S. Const. amend. I.

6 N.Y. Const. art. XI, § 3.

7 Fla. Const. art. 1, § 3.

few, Jews, Christians, Catholics, Protestants, Baptists, Presbyterians, Lutherans, and Methodists. This fencing out is accomplished in the same manner that Amendment 2 fences out homosexuals and bisexuals -- the establishment clauses "single[] out" and "prohibit[]" religionists "from seeking governmental action favorable to [them] and thus, from participating equally in the political process." *Evans I*, 854 P.2d at 1285 (footnote omitted).

The Colorado Supreme Court's decision below, if left unreversed, will inevitably pit the Fourteenth Amendment's Equal Protection Clause against a number of traditional constitutional guarantees, both state and federal. Such a bizarre prospect is reason enough for this Court to grant petitioner's request for review.

IV. The Right Of The People To Address The Issue Of Homosexual Rights By Amendment To Their Fundamental Law Is At Stake

The issue of homosexual rights, although primarily a state and local one, is not confined to the State of Colorado. Nor is the strategy to take that issue out of the hands of state and local legislative bodies limited to that state. To the contrary, the people of a number of states and localities have taken the initiative by constitutional amendment or city charter amendment to remove from their elected representatives the power to make homosexuals a legally protected class.

In 1994 alone, movements were undertaken in at least seven states (Arizona, Florida, Maine, Michigan, Missouri, Nevada, and Oregon) to amend the state constitutions to accomplish the same objectives of Amendment 2, and in at least two states (Idaho and Washington) passage of statutes with similar objectives was attempted.[8] In cities and counties such as Cincinnati, Ohio; Lewiston, Maine; Springfield, Missouri; Austin, Texas; and Alachua County, Florida, voters repealed or prohibited special protection based on homosexual conduct or

8 *Summary of 1994 Anti-Gay/Lesbian/Bisexual Ballot Initiatives*, National Gay & Lesbian Task Force Policy Institute, (Washington, D.C.) July 12, 1994; *National News*, The Washington Blade, Jan. 28, 1994, at 20-21.

orientation.[9] All such amendments or legislation will undoubtedly fall under the new equal protection analysis.

Conversely, as of May 1993, at least 139 jurisdictions had some form of homosexual rights legislation.[10] Pro-homosexual legislation will, of course, remain untouched by the Colorado Supreme Court's equal protection endeavors.

The homosexual rights issue is at the heart of an ongoing debate. The recent efforts of the two sides demonstrate that the political zeal and determination is building, not abating.[11] This Court should not permit the court below to give one side of this political debate an illegitimate "constitutional" advantage by invalidating legitimate and successful political achievements. If the analysis of the court below is not rejected, it will "foreclos[e] all democratic outlet for the deep passions this issue arouses," will "banish[ ] the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight," and will impose "a rigid national rule instead of allowing for regional differences . . . ." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795, 4842 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

The City of Cincinnati is a case in point. On November 2, 1993, the people of Cincinnati overwhelmingly approved an amendment to the city's charter denying to the city council the power to treat "homosexual, lesbian, or bisexual orientation, status, conduct, or relationship" as a class deserving of "minority or protected status, quota

9 Jim Simon, *Gay-Rights Fight Takes National Stage, Conservative Groups See 'Clash Of Two Belief Systems,'* Seattle Times, May 29, 1994, at B1; Edith Paal, *National Group May Join Gay-Rights Fight*, Gainesville Sun, Nov. 12, 1994, at 1B.

10 Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1923-25 (1993).

11 Pro-morality groups have pledged to continue the fight. *OCA* (Oregon Citizens Alliance) *Looks To Next Ballot Issue*, Statesman Journal (Salem, Or.), Nov. 10, 1994, at 3A; *Anti-Gay Rights Group Submits Petitions To Force Referendum*, Sun-Journal (Lewiston, Me.), Aug. 23, 1994, at 3; Letter from Kelly Walton, Chairman, Idaho Citizens Alliance (ICA) to ICA friends (Dec. 1994) (Heyburn, Idaho).

preference or other preferential treatment." Cincinnati, Ohio, Charter, art. XII (Nov. 2, 1993). Seventeen days later, a federal district judge granted a preliminary injunction against the enforcement of the charter amendment. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 838 F.Supp. 1235, 1243 (S.D. Ohio 1993) (*Equality I*). Nine and one-half months after that the judge entered a permanent injunction. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 860 F.Supp. 417, 449 (S.D. Ohio 1994) (*Equality II*). To support both of his rulings, the federal trial judge relied heavily upon the Colorado Supreme Court's decision below. *Equality I,* 838 F.Supp. at 1238-42; *Equality II,* 860 F.Supp. at 430-31.

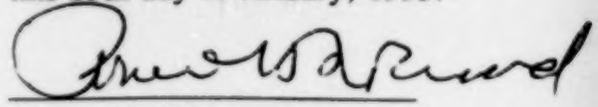
The Cincinnati, Ohio decision is on appeal to the United States Court of Appeals for the Sixth Circuit, and has not yet been decided. However, there is very good reason to believe that the Court of Appeals will reverse because it has previously acknowledged that *Hunter* is a suspect classification/equal protection case, not a fundamental rights/equal protection case. *Arthur v. City of Toledo,* 782 F.2d 565, 571 (6th Cir. 1986).

Not only is there an existing conflict between the Colorado ruling below and the Sixth Circuit's reasoning in *Arthur* -- a conflict likely to be exacerbated by the Sixth Circuit's ruling on *Equality I and II* -- but there is also an existing conflict with other jurisdictions which have cited *Hunter* as a suspect classification case. *See, e.g., Flores v. Pierce,* 617 F.2d 1386, 1391 (9th Cir. 1980), *cert. denied sub nom. Antry v. Flores,* 449 U.S. 875 (1980); *Kills Crow v. United States,* 451 F.2d 323, 325 (8th Cir. 1971), *cert. denied,* 405 U.S. 999 (1972); *Peyote Way Church of God, Inc. v. Thornburgh,* 922 F.2d 1210, 1214-15 (5th Cir. 1991); *Habron v. Epstein,* 412 F.Supp. 256, 259 (D. Md. 1976), *aff'd.,* 429 U.S. 802 (1976); *Hall v. Pennsylvania State Police,* 570 F.2d 86, 90 (3rd Cir. 1978); *Upshaw v. McNamara,* 435 F.2d 1188, 1190 (1st Cir. 1970).

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted
this 25th day of January, 1995.



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MOTION FILED

JAN 25 1995

(5)

No. 94-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF THE FAMILY DEFENSE COUNCIL

in support of the *Petitioners*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE FAMILY DEFENSE COUNCIL
in support of the *Petitioners*

The Family Defense Council (FDC), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action to present arguments stating why the petitioners' request should be granted. This request is based on Rule 10.1(c) of the Supreme Court of the United States.

The FDC is a national, non-profit, non-sectarian organization that has been at the forefront of the public debate over the importance of traditional morality and the danger of non-traditional lifestyles. The FDC's experience in assisting local communities decide their moral environment free from special interest group pressure enables the Council to bring new issues to the attention of this Court.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, and the Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: The City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
Representing: The City of Boulder.
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: The City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.

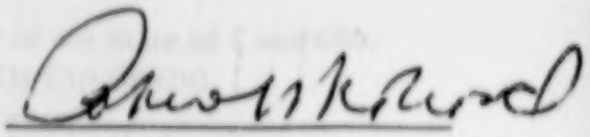

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TABLE OF CONTENTS

TABLE OF AUTHORITIES viii

INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE PETITION 2

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions As Well As Its Settled Fundamental Rights Jurisprudence 2

A. The Opinion Below Conflicts With *Richardson v. Ramirez* 2

B. The Opinion Below Conflicts With *Bowers v. Hardwick* 8

CONCLUSION 11

CASES — PAGE(S)

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990) 9

Bowers v. Hardwick, 478 U.S. 186 (1986) 2, 8, 9

Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) 9

Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*) 2, 3, 5, 6

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (*Evans II*) 6, 8

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 4

High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) 9

Mahan v. Howell, 410 U.S. 315 (1973) 7

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 9, 10

Reynolds v. Sims, 377 U.S. 533 (1964) 4, 7

Richardson v. Ramirez, 418 U.S. 24 (1974) 2-5

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 9

CONSTITUTIONS — PAGE(S)

U.S. Const. art. IV, § 4 7

OTHER AUTHORITIES

The Federalist No. 10 (James Madison) 7

INTEREST OF AMICUS

The Family Defense Council (FDC) is a national, non-sectarian, not-for-profit organization, the purpose of which is to promote and preserve traditional family values.

The FDC has expended considerable resources in educating the public about the importance of traditional morality and the implication of threats that undermine the continuing vitality of the American family.

The Chairman of the Board of FDC is Dr. Howard L. Hurwitz of Jamaica, New York. He has over forty years experience as a history teacher, high school principal, and educational consultant. He has authored numerous books on history, education, and economics. He is a nationally recognized authority on education and the social significance of the family in America.

The FDC, under the direction of Dr. Hurwitz and its board, in addition to its efforts in the promotion of the traditional family, desires to maintain the right of the people to establish those principles that will be most conducive to the strengthening of the family. The FDC believes that the citizens of the states should be free to pursue by constitutional means those matters that are of concern to society and the family. The FDC, as a national organization, is interested in protecting the right of the citizens of Colorado, as well as the right of citizens in all states to direct their government in support of undergirding the traditional family.

The FDC believes that as amicus curiae its experience on matters affecting the family will be of assistance to this court in evaluating and deciding this petition.

REASONS FOR GRANTING THE PETITION

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions As Well As Its Settled Fundamental Rights Jurisprudence

The decision of the Colorado Supreme Court conflicts with this Court's decisions in *Richardson v. Ramirez*, 418 U.S. 24 (1974) and in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Moreover, it departs significantly from this Court's approach to fundamental rights under both the Fourteenth Amendment's Equal Protection and Due Process Clauses.

A. The Opinion Below Conflicts With Richardson v. Ramirez

At the heart of the court's opinion below, is the proposition that the Fourteenth Amendment's Equal Protection Clause prohibits the people of a state from "fencing out an identifiable group" from participating fully in the state's political processes. In support of its position, the court stated:

> Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."
>
> In short, gay men, lesbians and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons.

Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*) (citations omitted).

Twenty years ago, this Court rejected this kind of extreme egalitarian analysis even when applied to the firmly established fundamental right to vote. In *Ramirez*, this Court turned away an effort to extend its earlier voting rights cases to "support the conclusions of the Supreme Court of California that a State must show a 'compelling state interest' to justify exclusion of ex-felons from the franchise." *Ramirez*, 418 U.S. at 54. By refusing this invitation, this Court affirmed the right of the people of a state to impose a constitutional barrier that clearly "fenced out" an "identifiable group" not only from participating equally in the political processes, *but from the vote, itself.*

In its opinion in *Ramirez*, this Court did not carve out an exception to a general constitutional rule of political equality. To the contrary, this Court reasoned that the Equal Protection Clause of the Fourteenth Amendment should not be construed to prohibit historically sanctioned practices of disqualifying certain citizens from the right to vote.[1] As for the exclusion of convicted felons from exercising the franchise, this Court found convincing historical evidence in Section 2 of the Fourteenth Amendment, in the state constitutions in existence at the time of the adoption of the Fourteenth Amendment, and in Congressional actions readmitting the southern states to the union.[2] In addition, this Court pointed to a number of United States Supreme Court opinions, dating from 1885, affirming the exclusion of convicted felons, "bigamists and polygamists," nonresidents and minors from the voting privilege.[3]

The lesson of *Ramirez* is clear. The meaning of "equal protection" must be shaped in conformity with legitimate historical and judicial understandings of equality. Such understandings, the *Ramirez* majority

1 *See Ramirez*, 418 U.S. at 41-54.
2 *Id.* at 41-52.
3 *Id.* at 53.

ruled, could not be discarded as "outmoded," no matter how appealing more enlightened views of political equality and democratic participation might be. *Such matters belong to the people, not this Court. Ramirez*, 418 U.S. at 55.

The impact of *Ramirez* on this Court's fundamental rights jurisprudence was not lost on dissenting justices Thurgood Marshall and William Brennan. Justice Marshall, writing for himself and Justice Brennan, chided the majority for "'shackl[ing]'" the Fourteenth Amendment's Equal Protection Clause to a "'political theory'" of an earlier era and "'to historic notions of equality.'"[4] Then, with reasoning strikingly similar to that employed by the Colorado Supreme Court, Justice Marshall proceeded to show why he thought that the Equal Protection Clause of the Fourteenth Amendment prohibited states from denying the right to vote to convicted felons.

First, like the court below, Justice Marshall began with a general proposition from this Court's early voting cases:

> Th[is] analysis properly begins with the observation that . . . the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government . . . ."

Ramirez, 418 U.S. at 77 (Marshall, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

Then, again like the Colorado Supreme Court, Justice Marshall invoked, without analysis or discussion, the strict scrutiny standard.[5] He, like the court below, simply assumed that denial of full participation in the political process required, without more, proof of a compelling state interest. Having made this assumption, Justice Marshall, like the Colorado court, rejected every effort of the state to justify any departure

4 *Ramirez*, 418 U.S. at 76 (Marshall, J., dissenting) (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966)).
5 *Id.* at 78.

from his constitutional premise, namely, absolute political equality. *Ramirez*, 418 U.S. at 78-86.

In *Ramirez*, California attempted to justify its constitutional provision denying the franchise to convicted felons on the grounds that such a denial would preserve the "interests of an orderly society."[6] Justice Marshall interjected that fencing out a sector of the population was constitutionally impermissible. Societal order and stability, he reasoned, was constitutionally subordinate to equal participation in the political process:

> The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing re-examination. This Court's holding in Davis, supra, and Murphy, supra, that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views.

Ramirez, 418 U.S. at 82.

What dissenting Justice Marshall found to be constitutionally impermissible in *Ramirez*, the Colorado Supreme Court found to be forbidden in this case, and for substantially the same reasons:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. . . .
>
> . . . .
>
> Prior to the passage of this amendment, gay men, lesbians, and bisexuals were . . . free to appeal to state and local government for protection against discrimination . . . . Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others.

Evans I, 854 P.2d at 1285-86 (footnote omitted).

Given this egalitarian view of the Fourteenth Amendment's Equal Protection Clause, the Colorado court, like dissenting Justice Marshall in *Ramirez*, rejected the state's plea that Amendment 2 served the compelling state interest of preserving societal order, in this case, by deterring factionalism.

> We reject the argument that the interest in deterring factionalism . . . is compelling. Political debate, even if characterized as 'factionalism,' is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy.

Evans v. Romer, 882 P.2d 1335, 1348 (Colo. 1994) (*Evans II*).

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6 *Ramirez*, 418 U.S. at 81 (Marshall, J., dissenting).

This is astounding! James Madison devoted an entire Federalist Paper[7] to justification of a number of constitutional limitations as "cur[es for] the mischiefs of faction[s]." The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). According to this Court's holding and reasoning in *Ramirez*, such historical practices cannot be torpedoed by modern notions of "equality" and "democracy" lest the Fourteenth Amendment's Equal Protection Clause collide head-on with a number of time-honored principles that characterize the constitutionally guaranteed "republican form of government." U.S. Const. art. IV, § 4.

Even in the voting rights cases, this Court has not yielded to extreme egalitarian claims such as those embraced by the Colorado Supreme Court. For example, this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), approved a state legislative redistricting scheme that deviated significantly from the one-person, one-vote rule applied to Congressional redistricting. In support, this Court recalled that the seminal voting rights case, *Reynolds v. Sims*, 377 U.S. 533 (1964), anticipated that its equality rule governing the weight of a person's vote in electing members of a state legislature could be tempered by the preservation of traditional and historical political subdivisions. *Mahan*, 410 U.S. at 321-22. In *Mahan*, this Court ruled that the interest in preserving such subdivisions did not need to be compelling, nor necessary, but only "reasonabl[e] . . . to advance the rational state policy of respecting the boundaries of political subdivisions." *Id.* at 328.

This Court should grant the requested writ of certiorari and repudiate the extreme egalitarian views of the Colorado Supreme Court by rendering a decision in this case in keeping with its insistence that no fundamental right may be forged under the Equal Protection Clause of the Fourteenth Amendment in disregard of the nation's history and judicial precedent.

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7 The Federalist No. 10 (James Madison).

B. The Opinion Below Conflicts With Bowers v. Hardwick

The lesson of history is equally applicable to the Colorado Supreme Court's decision to include "gay men, lesbians, and bisexuals" in the category of "identifiable groups" to be protected, in its view, from state measures that deny to them equal participation in the political process.

Only once in its opinions below, did the Colorado Supreme Court address the contention that its protection of homosexuals might conflict with this Court's holding in *Bowers*. And then its treatment was brief:

> The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see Bowers v. Hardwick* . . . is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

Evans II, 882 P.2d at 1350 (citation omitted).

Such cavalier treatment of the *Bowers'* precedent reveals once again that the court below has deliberately refused to follow the authoritative guidelines of this Court.

In *Bowers*, this Court painstakingly set out the legal criteria governing the application of its fundamental rights doctrine under the Fourteenth Amendment's Due Process Clause. And, as is the case with fundamental rights under the Fourteenth Amendment's Equal Protection

Clause, this Court has determined that questions of fundamental rights under the Due Process Clause of the Fourteenth Amendment require a careful assessment of history. *See also, Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring).

Accordingly, in *Bowers* this Court began its analysis of the claim that homosexual conduct in private between consenting adults is a fundamental right by observing that, at the time of the ratification of the Fourteenth Amendment, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Bowers*, 478 U.S. at 193 (footnote omitted). This Court noted further that, prior to that date, and for nearly 100 years thereafter, as many as 100 percent of the states "provide[d] criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 194. Given this historical record, this Court refused constitutional protection to private homosexual conduct between consenting adults:

> [T]o claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Bowers, 478 U.S. at 194.

This Court having so decisively rejected the claim that homosexual behavior is a fundamental right under the Fourteenth Amendment's Due Process Clause, numerous United States Courts of Appeal have concluded that *Bowers* absolutely precludes homosexuals from qualifying as a suspect class deserving strict scrutiny under equal protection. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 & n.6 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). What a state could constitutionally make criminal cannot possibly be the basis of a

suspect classification for the purposes of equal protection. *Padula*, 822 F.2d at 103.

If, given *Bowers*, homosexuality cannot be a suspect classification qualifying for strict scrutiny under the Fourteenth Amendment's Equal Protection Clause then how, given *Bowers*, can homosexuals be an "identifiable group" qualifying for strict scrutiny under that same clause? In its opinion below, the Colorado Supreme Court did not address, much less answer, this question.

If a state may criminalize homosexual behavior, as *Bowers* has ruled, it may, according to *Ramirez* deny the elective franchise to any person convicted of that crime. Why, then, could not a state prohibit, by constitutional amendment, the enactment of laws granting heightened protection for persons when it could criminalize that behavior and, potentially, deny to the entire class the right to vote? Again, the Colorado Supreme Court did not address, much less answer, this question.

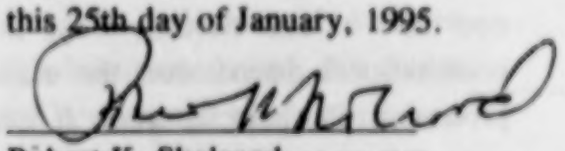
The United States Courts of Appeal have tackled the tough questions and, on the basis of *Bowers*, denied constitutional protection to homosexuals as a suspect class. On the basis of these decisions alone, this Court should grant this petition for writ of certiorari and reverse the decision below.

CONCLUSION

By disregarding this Court's rulings that "equality" and "fundamental rights" must be defined consistently with legitimate historical and traditional distinctions, the court below rendered a decision inconsistent with this Court's rulings in *Ramirez* and *Bowers*.

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted
this 25th day of January, 1995.



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Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case Nos. 94SA48 And 94SA128

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

REASONS FOR GRANTING THE PETITION 1

I. SUMMARY OF ARGUMENT 1

II. COLORADO AMENDMENT 2 DOES NOT IMPAIR ANY FUNDAMENTAL RIGHT WITHIN THE MEANING OF THIS COURT'S EQUAL PROTECTION CASELAW 4

III. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COLORADO SUPREME COURT IS INCONSISTENT WITH THE RIGHT OF THE PEOPLE TO ENACT CONSTITUTIONAL PROVISIONS TO PROTECT CIVIL LIBERTIES 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Bolling v. Sharpe, 347 U.S. 497 (1954) 10

Crawford v. Board of Educ., 458 U.S. 527 (1982)..... 12

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994).....3, 11

Gordon v. Lance, 403 U.S. 1 (1971)..... 7, 8, 9

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

James v. Valtierra, 402 U.S. 137 (1971)..... 3, 5-9, 14

Kramer v. Union Free School Dist., 395 U.S. 621 (1969).....2, 9

Reynolds v. Sims, 377 U.S. 533 (1964) 2, 9

Washington v. Seattle School Dist. No.1, 458 U.S. 457 (1982) 5, 6, 8

Williams v. Rhodes, 393 U.S. 23 (1968) 2, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I..... 10

U.S. Const. amend. IV 10

U.S. Const. amend. V..... 10

U.S. Const. amend. VI 10

U.S. Const. amend. VIII..... 10

U.S. Const. amend XIV, § 1..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Michael Booth, *Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994..... 13

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 4

INTERESTS OF AMICI CURIAE

Amici curiae states hold a common view that the ruling and rationale below pose a serious threat to state constitutional provisions, and more generally, to legislation enacted at any level other than local government. As detailed below, the Colorado Supreme Court has announced a fundamental constitutional right of equal group participation in the political process that, if allowed to stand, necessarily disqualifies state constitutions as repositories of important public policies.

Further, the novel theory underlying the ruling conflicts with established priciples of equal protection, thus undermining the stability necessary for states to conduct their public affairs with reasonable confidence.

Amici curiae states join in this brief to focus attention on flaws in the analysis below and to illuminate their negative consequences for state governments.

REASONS FOR GRANTING THE PETITION

I. Summary of Argument

This is a case in which the Supreme Court of Colorado stretched beyond recognition several of this Court's equal protection decisions to create a new fundamental right of breathtaking scope. This case is not one involving suspect classifications. *See, e.g., Hunter v. Erickson,* 393 U.S. 385 (1969). Nor is it about the right to cast a vote for

the candidate of one's choice. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). Nor is it about the dilution of one's vote through the process of assigning voters to unequal districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Respondents seek not the vote, but rather the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to restrict. In other words, Respondents seek (and the Colorado Supreme Court has delivered) a right of any and every "independently identifiable" interest group to have its regulatory agenda insulated by the Equal Protection Clause against the countervailing interests of others.

According to the Colorado Supreme Court, Amendment 2 violates equal protection because it removes one issue favored by an identifiable (but non-suspect) group from the ordinary political process by treating the issue – homosexual and bisexual rights – as a matter of state constitutional law. *Evans v. Romer*, 854 P. 2d 1270 (Colo. 1993) ("*Evans I*"), Pet. App. D-25-26.[1] According to the court, strict scrutiny is triggered under the Equal Protection Clause not because Amendment 2 employs a suspect classification, but because it "singles out and prohibits

[1] *Evans I* affirmed the trial court's issuance of a preliminary injunction against enforcement of Amendment 2. Subsequently, the Colorado Supreme Court reaffirmed the constitutional principles it had articulated in *Evans I* and entered final judgment permanently enjoining enforcement of Amendment 2. *Evans v. Romer*, 94SA48 and 94SA128, (Colo. Oct. 11, 1994) ("*Evans II*") (Pet. App. B).

this [non-suspect] class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process." *Id.* at D-26. Remarkably, this newly discovered group-right of political participation somehow required the court to set aside the results of a voter initiative.

Not only is the court's holding not supported by *Hunter* or any of this Court's other precedents, it directly conflicts with the holding and reasoning of *James v. Valtierra*, 402 U.S. 137 (1971), which explicitly rejected an equal protection claim identical in all material respects to that upheld by the court in this case. *Hunter* and its progeny are not about an Equal Protection Clause at war with popular democracy and state constitutional freedoms. Instead, this important line of cases is inextricably intertwined with the central meaning of equal protection – the protection of racial minorities against laws which place unique burdens upon their ability to enact legislation prohibiting racial discrimination. *Hunter*, 393 U.S. at 391.

The court below erred by applying strict scrutiny to Amendment 2. This erroneous decision has already been followed by one federal district court to set aside a similar ballot initiative passed by voters in Cincinnati, Ohio. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994). The decision also casts a long shadow over numerous provisions of state constitutions which remove issues favored by other "identifiable groups" from the ordinary political process. Accordingly, the issue presented by this case is one of national significance, and review by this Court is clearly warranted.

II. Colorado Amendment 2 Does Not Impair Any Fundamental Right Within The Meaning Of This Court's Equal Protection Caselaw

The trial court rejected Respondents' claim that homosexuals and bisexuals constitute a suspect or quasi-suspect class. Pet. App. C-18-19. Respondents did not appeal that holding, and the Colorado Supreme Court did not base its decision on a suspect or quasi-suspect class rationale. *Evans I* (Pet. App. D-7-8); *Evans II* (Pet. App. B-6 n.3). Thus, in order to trigger strict scrutiny of Amendment 2, it was necessary for Respondents to establish that the amendment creates "inequalities bearing on fundamental rights." *See* Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988).

The Colorado Supreme Court stated that the "most explicit, and nuanced, articulation" of the fundamental right issue was contained in a series of decisions, beginning with *Hunter*, in which this Court reviewed "legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." *Evans I* (Pet. App. D-14). However, the cases relied upon by the court do not support the court's analysis.

In *Hunter*, this Court considered whether an amendment to the Akron, Ohio city charter violated the Equal Protection Clause. The amendment prohibited the City Council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters in a regular or general election. The racially discriminatory impact of this provision was crucial to the Court's rationale. *Hunter*

was a difficult case not because this Court was crafting a sophisticated new right of political participation for any and every identifiable group, but rather because the Court needed to explain how a facially-neutral classification constituted a "meaningful and unjustified official distinction[ ] based on race." *Hunter*, 393 U.S. at 391. In other words, the Court's task in *Hunter* was to point out that, despite its surface neutrality, the charter amendment placed "special burdens on *racial minorities*" concerning their ability to enact legislation prohibiting racial discrimination in housing. *Id.* (emphasis added).

Similarly, in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), this Court invalidated a voter initiative which stipulated that no local school board could require any student to attend a school other than the one located nearest or next nearest to the child's residence. The initiative was facially neutral regarding race, but included a large number of exceptions to the rule which led this Court to conclude it was enacted "because of" not merely "in spite of" its adverse effects upon busing for racial integration. *Id.* at 471. The Court carefully discussed the meaning of *Hunter* and explained why legislation of the kind challenged in that case "falls into an inherently suspect category:"

> [W]hen the political process or the decisionmaking mechanism used to address *racially* conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' "

Id. at 485-86 (quoting *James v. Valtierra*, 402 U.S. at 141 and *Hunter v. Erickson*, 393 U.S. at 391) (emphasis added).

There is no reasonable way to read *Hunter* and *Seattle School District* as supporting the far-reaching fundamental right applied by the court in the case below. Both cases involved this Court's efforts to implement the principle lying at the core of equal protection – the prevention of invidious discrimination on the basis of race.

As Justice Erickson's thoughtful dissent in *Evans I* makes clear, the Colorado Supreme Court's reading of *Hunter* as the source of a broad right of political participation for "identifiable groups" was explicitly discussed and rejected by this Court in *James*. *See Evans I* (Pet. App. D-49-52) (Erickson, J., dissenting). *James* upheld the constitutionality of a California constitutional amendment which provided that no "low rent housing project" could be undertaken by "any state public body" until the project was approved by a majority of the voters at a community election. *James*, 402 U.S. at 139 n.2.

Thus, as in the case of Colorado Amendment 2, the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. Appellees in *James*, a number of low income residents of California, argued that the California amendment constituted "unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." 402 U.S. at 142. The Court clearly rejected this attack on California's "procedure for democratic decisionmaking." *Id.* at 143. Justice Black's majority opinion in *James* explained the Court's reasoning in terms which reject authoritatively the reasoning of the Colorado Supreme Court in this case:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

Id. at 142. Since the Court in *James* read *Hunter* as a case involving political burdens on racial minorities (*id.* at 140-41), and since the poor are not a suspect class under the Equal Protection Clause, the Court held that the California amendment could be invalidated "only by extending *Hunter*, and this we decline to do." *Id.* at 141.

Likewise, the Colorado Supreme Court's attempt to read *Gordon v. Lance*, 403 U.S. 1 (1971), as support for an extremely far-reaching right of political participation is misguided. *See Evans I* (Pet. App. D-19-20). In *Gordon*, this Court upheld a West Virginia law that proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The Court held that unlike the facts of *Hunter*, the West Virginia law did not single out any "discrete and insular minority" for special burdens. 403 U.S. at 5. Therefore, there was no equal protection violation. *Id.* at 7.

The Colorado Supreme Court argued that since the West Virginia laws upheld in *Gordon* "had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*," it is clear that *Hunter* "applies to a broad spectrum of discriminatory legislation." *Evans I* (Pet. App. D-19-20). The court attempted to bolster this specious reasoning by

adding the following trivial insight: "If . . . *Hunter* is a 'race' case and nothing more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*." *Id.* But, of course, this Court in *Gordon* did precisely what *Evans I* said it did not do – it discussed *Hunter* only to distinguish it as a case involving legislation which singled out racial minorities and other suspect classes for unfavorable treatment. *Gordon*, 403 U.S. at 5. Although the West Virginia laws made it more difficult for some political groups to enact their legislative agendas, these laws did not discriminate against any racial or other suspect class and, therefore, did not violate the Equal Protection Clause. *Id.* at 5-7. Thus, *Gordon* is an application – not a repudiation – of the "race only" reading of *Hunter*.

Taken one by one or together, *Hunter, Seattle School District, James*, and *Gordon* do not support a broad right for any and every identifiable group to have its political agenda insulated against the civil liberties of others. Rather, these cases recognize that the central purpose of the Equal Protection Clause is to protect racial and other suspect classes against discriminatory state action. Therefore, laws that interfere with the right of racial and ethnic minorities to participate in the political process are subject to strict scrutiny even if the laws are facially neutral.[2] However, laws that make it more difficult for non-suspect

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[2] *Hunter* and *Seattle School District* are not fundamental rights cases. They merely hold that a law which restricts the ability of a suspect class to participate in the political process employs a suspect classification notwithstanding its facial neutrality.

groups to enact their political agendas, such as the laws upheld in *James* and *Gordon*, do not conflict with equal protection. Since Colorado Amendment 2 falls into the latter category, the court below erred by subjecting the amendment to strict scrutiny.

The Colorado Supreme Court also found support for the fundamental right of political participation in this Court's cases dealing with the right to an equally weighted vote for the candidates of one's choice. *See e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964). In each of these cases, however, the basis for this Court's decision was the fact that the challenged laws impinged directly on the established and fundamental right to vote. In this case, there is no state-created obstacle to voting or any other aspect of the political process. The right-to-vote cases are not applicable to Amendment 2, and the court below erred by relying upon them as support for its decision.

III. The Fundamental Right of Political Participation Created By The Colorado Supreme Court Is Inconsistent With The Right Of The People To Enact Constitutional Provisions To Protect Civil Liberties

The potential scope of the right recognized by the Colorado Supreme Court in this case is breathtaking. If the court means what it says, it has discovered a constitutional right of any "independently identifiable class of persons" to have its political agenda insulated against normal democratic processes.

The idea animating this remarkable new right appears to be the truism that constitutional law discourages political participation by groups who favor unconstitutional legislation. Thus, homosexuals and bisexuals were discouraged by Colorado Amendment 2, because it made their desire to regulate the businesses and property of others – through enactment of "gay rights" legislation – more difficult to accomplish. Similarly, many religious groups are discouraged from political participation by the Establishment Clause, because it prohibits the enactment of their political preferences for state-financed parochial schools.[3]

Pro-life groups, members of which often share an "independently identifiable" religious and cultural heritage, are discouraged by the unenumerated right of privacy, by state Equal Rights Amendments, and by other provisions of state constitutions protecting reproductive rights, because these provisions prohibit their strong preferences for laws restricting access to abortion services. Organized groups of crime victims are discouraged from political participation by the Fourth, Fifth, Sixth, and Eighth Amendments, and by their counterparts in

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[3] Presumably, the new right of political participation would apply against the federal government under the equal protection component of the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Thus, many provisions of the Bill of Rights may restrict the right of political participation of independently identifiable groups whose favorite issues are removed from the ordinary political process by these constitutional guarantees. The Colorado Supreme Court did not provide any guidelines for resolving the tension between the new fundamental right and the Bill of Rights.

state constitutions, because these civil liberties invalidate laws that violate the rights of defendants in criminal cases.

The list is endless. Constitutional law routinely discourages groups from seeking to legislate political agendas which the constitution has taken out of the hands of legislators. Indeed, one of the purposes of constitutional law undoubtedly is to shelter persons whose liberties are protected by the constitution against political agendas designed to restrict those rights.

The right of political participation created by the Colorado Supreme Court in this case casts a long shadow over the right of the people to protect their freedom by adopting constitutional liberties. Although the Colorado Supreme Court did not define the concept of an "independently identifiable group," it did conclude that it was broad enough to cover non-suspect classes such as homosexuals and bisexuals. *Evans I* (Pet. App. D-25-26). Moreover, while denying that it was opening the floodgates for other groups wishing to employ the right of political participation, the court supplied no limiting principle to contain this new right. *Id.* at D-23-27.

In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), a federal district court followed *Evans I* and permanently enjoined a ballot initiative passed overwhelmingly by the voters of Cincinnati. The court attempted to limit the scope of the right of political participation by distinguishing between "independently identifiable groups" and mere "identifiable groups." 860 F. Supp. at 434 n.12. The court said that "the difference

between an 'independently identifiable group' and an 'identifiable group' is that where the factor identifying the group transcends the mere support for any given issue, the group is 'independently identifiable.' " *Id.* "On the other hand, a group whose sole identifying characteristic is that group's support for a single issue is merely an identifiable group." *Id.* Under this definition, most identifiable groups – such as the ones discussed in the examples above – are also independently identifiable groups.[4] Indeed, any generally applicable definition of independently identifiable group that is broad enough to include homosexuals and bisexuals almost certainly will include many other groups whose policy preferences have been placed beyond the ordinary political process by the federal and state constitutional rights of individuals.

Clearly, homosexuals do not have a constitutional right to be included as a protected class under anti-discrimination laws. *See Crawford v. Board of Educ.*, 458 U.S. 527, 542 (1982). The issue in this case is whether the Equal Protection Clause dictates the level at which issues affecting homosexuals (or any other identifiable group) must be decided. In effect, the court below held that all issues affecting identifiable groups must be decided by elected representatives, not by direct democracy or constitutional amendment. This unprecedented decision is a significant threat to the right of direct self-government

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[4] For example, many groups which support state-financing for parochial schools share a common religious tradition, dating back thousands of years, which transcends any particular issue. Similarly, many (perhaps most) pro-life groups, such as Lutherans For Life and organized groups of Roman Catholics, are composed of individuals who share characteristics which transcend the politics of abortion.

through citizen initiatives. It also threatens to invalidate many basic rights currently existing under state constitutions. Finally, the right of political participation is inconsistent with many provisions of the Bill of Rights and other provisions of the Federal Constitution, because many of these provisions, like Amendment 2, remove issues favored by identifiable groups from the ordinary political process.

In sum, the revolutionary and unprecedented right of political participation created by the Colorado Supreme Court in *Evans I* seriously threatens not only the right of popular democracy, but also many basic individual liberties guaranteed by provisions of federal law and state constitutions, and creates a tension between this new right and provisions of the Bill of Rights which courts would have to resolve. This erroneous decision has already been followed by one federal trial court, and has been cited in many other jurisdictions to chill attempts to enact initiatives similar to Amendment 2.[5]

Further review is clearly warranted to clarify this important area of equal protection doctrine.

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[5] According to an attorney representing the Lambda Legal Defense Fund, the court's decision in this case is "very important on a national level. It sends a message throughout the country that anti-gay measures endanger the democratic process. It also sends an important message that the majority cannot sweep away minority rights by popular vote." Michael Booth, *Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994, at 11A. The same attorney noted that the opinions in *Evans* were being used to attack citizen initiatives in Oregon, Idaho, and Florida. *Id.*

CONCLUSION

The Colorado Supreme Court has misinterpreted several of this Court's equal protection decisions to create an unprecedented and revolutionary fundamental right of any and every "independently identifiable" interest group to have its regulatory agenda insulated against the countervailing interests of others. This new equal protection doctrine has cast a long shadow of uncertainty not only over the traditional right of democratic self-government, but also over the concept of constitutionalism – of representative government tempered by individual liberty. Clearly, the Equal Protection Clause does not provide protection for any and every special interest group against the political discouragement that necessarily arises when a political issue favored by the group is removed from the ordinary political process by a constitutional amendment. This case presents this Court with an ideal opportunity to clarify the true meaning of its decisions in *Hunter* and *James*.

For all of the foregoing reasons, *amici* urge the Court to grant the Petition and issue a Writ of Certiorari to the Supreme Court of the State of Colorado.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94 - 1039

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 12, 1994
CERTIORARI GRANTED FEBRUARY 21, 1995

273PP

TABLE OF CONTENTS

PAGE

Relevant Docket Entries 1

Amended Complaint 2

Plaintiffs' Exhibit 46 (Governor's Executive Order) 22

Plaintiffs' Exhibit 43, (Insurance Statutes) 24

Plaintiffs' Exhibit 59 (Insurance Regulation) 28

Plaintiffs' Exhibit 41 (Colorado Code of Judicial Conduct, Canon 3) 30

Plaintiffs' Exhibit 42 (Colorado Rules of Professional Conduct, Rule 1.2) 31

Plaintiffs' Exhibit 23 (Denver Ordinance) 32

Plaintiffs' Exhibit 30 (Denver Career Service Rule) 54

Plaintiffs' Exhibit 36 (Denver Mayor's Proclamation) 55

Plaintiffs' Exhibit 32 (Denver Police Department Operations Manual) 57

Plaintiffs' Exhibit 34 (Denver Police Department Operations Manual: Radio Communications) 58

PAGE

Plaintiffs' Exhibit 35 (Denver Police Department Operations Manual: Officers' Bill of Rights) 58

Plaintiffs' Exhibit 33 (Denver Police Department Directive) 59

Plaintiffs' Exhibit 118 (Boulder County Policy) 60

Plaintiffs' Exhibit 57 (Boulder Ordinance) 62

Affidavit of Leslie L. Durgin 80

Attachments to Affidavit of Dean F. Damon (Boulder Valley School District Materials) 82

Letter of Dani Newsum (Part of Defendants' Exhibit C) 86

Plaintiffs' Exhibit 48 (Aspen Ordinance) 90

Affidavit of John S. Bennett 93

Plaintiffs' Exhibit 117 (Aurora Rule) 94

Affidavit of Nancy C. Carney 95

Testimony of Jerome Culp 98

PAGE

Plaintiffs' Exhibit 18 (National Legal Foundation letter to Tony Marco) 100

Plaintiffs' Exhibit 15 (CFV Letter) 104

Letter of John Franklin (Part of Defendants' Exhibit C) 110

Affidavit of John Gillespie 115

Defendants' Exhibit B (Talmey/Drake Dec. 1992 Survey) 120

Attachment to Affidavit of Paul Talmey (Talmey/Drake Sept. 1993 Survey) 126

Testimony of Wilford Perkins 133

Testimony of Tony Marco 173

Testimony of Harvey Mansfield 189

Testimony of Joseph Broadus 202

Testimony of Robert George 212

Affidavit of James Hunter 237

Deposition Testimony of James Hunter 266

Rule 54(b) Order 267

That portion of the 1992 Ballot Proposal Analysis pertinent to Colorado's Amendment 2 has been omitted in printing this joint appendix, becuase it appears on and following page F-1 of the appendix to the printed Petition for Certiorari.

Similarly, the following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the District Court for the City and County of Denver, dated January 15, 1992 . . . . . E-1

Opinion of the Colorado Supreme Court, dated July 19, 1993 . . . . . D-1

Findings of Fact, Conclusions of Law, and Judgment of the District Court for the City and County of Denver, dated December 14, 1993 . . . . . C-1

Opinion of the Colorado Supreme Court, dated October 11, 1994 . . . . . B-1

Mandate of the Colorado Supreme Court, dated November 14, 1994 . . . . . A-1

RELEVANT DOCKET ENTRIES

Date	Action
November 12, 1992	Complaint Filed
December 23, 1992	Motion for Preliminary Injunction Filed
December 23, 1992	Amended Complaint Filed
December 29, 1992	City of Aspen's and City Council for City of Aspen's Motion for a Preliminary Injunction Filed
January 8, 1993	Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction Filed
January 11-14, 1993	Preliminary Injunction Hearing
January 15, 1993	Preliminary Injunction Issued
October 12-22, 1993	Trial
December 14, 1993	Order Finding Amendment 2 Unconstitutional and Making Preliminary Injunction Permanent
December 22, 1993	Motion for Reconsideration and to Alter or Amend Judgment
January 7, 1994	Order Denying Defendants' Motion for Reconsideration
February 9, 1994	Order Granting Request for Colo. R. Civ. P. 54(b) Certification: Court Determines There is no Just Reason for Delay on the Judgment Finding Amendment 2 Unconstitutional on the Grounds Stated

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

AMENDED COMPLAINT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON as Attorney General of the State of Colorado, and THE STATE OF COLORADO,

Defendants.

Plaintiffs Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Martina Navratilova, Bret Tanberg, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the Aspen City Council, through counsel, in Complaint against the defendants, state as follows:

INTRODUCTION

This is an action seeking a declaration that Amendment 2, approved by the Colorado electorate in the general election of November 3, 1992, violates the constitutions of the United States and the State of Colorado. Amendment 2 relegates gay men, lesbians and bisexuals to a second class citizenship contravening the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as other state and federal constitutional provisions.

Plaintiffs seek to enjoin defendants from proclaiming, declaring, or acknowledging Amendment 2 to be part of the Constitution of Colorado, and from enforcing or implementing it in any way.

JURISDICTION AND VENUE

This action for declaratory and injunctive relief is brought under the Uniform Declaratory Judgments Act, Colo. Rev. Stat. §§ 13-51-101, *et seq.*, Rules 57 and 65 of the Colorado Rules of Civil Procedure, and 42 U.S.C. § 1983.

State courts have jurisdiction over claims arising under 42 U.S.C. § 1983 by virtue of the Supremacy Clause of Article IV of the United States Constitution.

Venue is proper in this Court under Rule 98(c) of the Colorado Rules of Civil Procedure.

GENERAL ALLEGATIONS

Background

1. On November 3, 1992, the following proposed amendment to Article II of the Colorado Constitution was submitted to the voters as Amendment 2:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

2. On November 5, 1992, the Denver Post reported that 811,479 electors had voted for Amendment 2 and 707,525 electors had voted against it.

3. On information and belief, a proclamation giving effect to Amendment 2 will take place on or before January 16, 1993.

Plaintiffs

4. Plaintiff Richard G. Evans is a citizen of the United States and a resident of Denver, Colorado. He is employed by the City and County of Denver. Plaintiff Evans is a gay man.

5. Plaintiff Angela Romero is a citizen of the United States and a resident of Denver, Colorado. She is employed by the City and County of Denver as a police officer. Plaintiff Romero is a lesbian.

6. Plaintiff Paul Brown is a citizen of the United States and a resident of Denver, Colorado. He is employed by the State of Colorado. Plaintiff Brown is a gay man.

7. Plaintiff Linda Fowler is a citizen of the United States and a resident of Denver, Colorado. She is employed as a contract administrator by a private employer. Plaintiff Fowler is a lesbian.

8. "Jane Doe" is the assumed name of a citizen of the United States and a resident of Denver, Colorado. She is employed by a public entity in Jefferson County. Plaintiff Doe is a lesbian.

9. Plaintiff Martina Navratilova is a citizen of the United States and a resident of Aspen, Colorado. She is a professional tennis player. Plaintiff Navratilova is a lesbian.

10. Plaintiff Priscilla Inkpen is a citizen of the United States and a resident of Boulder, Colorado. Plaintiff Inkpen is an ordained minister. Plaintiff Inkpen is a lesbian.

11. Plaintiff John Miller is a citizen of the United States and a resident of Colorado Springs, Colorado. Plaintiff Miller is a Professor of Spanish at the University of Colorado - Colorado Springs (UCCS), Chair of the UCCS Department of Language and Culture and Chair of the University of Colorado's system-wide University Faculty Council. Plaintiff Miller is a gay man.

12. Plaintiff Boulder Valley School District RE-2 ("the School District"), as a Colorado public school district duly

constituted pursuant to the laws of Colorado, is a political subdivision of the State of Colorado and a quasi-municipal corporation with its administrative offices located in Boulder County, Colorado. The School District acts by and through its duly qualified and elected Board of Education.

13. Plaintiff Bret Tanberg is a citizen of the United States and a resident of Evans, Colorado. He is currently infected with the Human Immunodeficiency Virus ("HIV"), and has been diagnosed as having Acquired Immune Deficiency Syndrome ("AIDS"). Plaintiff Tanberg is heterosexual, but suffers discrimination based on a perception that he is gay.

14. Plaintiffs City of Boulder and City of Aspen are duly established and constituted home rule municipal corporations under Section 6 of Article XX of the Constitution of Colorado. Plaintiff City and County of Denver is a duly established and constituted home rule municipal corporation under Sections 4 and 5 of Article XX of the Constitution of Colorado.

15. Plaintiff City Council of the City of Aspen is the duly authorized legislative and governing body for the City of Aspen pursuant to Article III of the Home Rule Charter for the City of Aspen.

Defendants

16. Defendant Roy Romer is Governor of the State of Colorado. Defendant Romer is required by Article IV, Section 2 of the Colorado Constitution to "take care that the laws be faithfully executed." Defendant Romer is also required by Article V, Section 1, Paragraph (4) of the Colorado Constitution to make a proclamation, the effect of which will be to enact Amendment 2, not later than thirty days after the vote has been canvassed. The vote is to be

canvassed by the Secretary of State within 21 days after the election.

17. Defendant Gale Norton is Attorney General of the State of Colorado and required by Colo. Rev. Stat. § 24-31-101(1)(a) to "prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor."

18. Defendant State of Colorado was created under the authority of the Enabling Act, Act of March 3, 1875, ch. 139, 18 Stat. 474, and encompasses the branches, departments, agencies, and political subdivisions subject to the proscriptions of Amendment 2.

Factual Allegations

19. Sections 28-93 through 28-97 of the Denver Municipal Code currently protect plaintiffs Evans, Romero, Brown, Fowler and Doe from discrimination in employment, educational institutions, real estate transactions, public accommodations, and health and welfare service on the basis of their sexual orientation. If Amendment 2 repeals these sections as they apply to gay men, lesbians and bisexuals, plaintiffs Evans, Romero, Brown, Fowler and Doe will face the real, immediate and substantial risk of discrimination on the basis of their sexual orientation in employment, educational institutions, real estate transactions, public accommodations, and health and welfare services.

20. Rules and Regulations of the Denver Police Department, RR-122, and § 117.01 ("Officer's Bill of Rights") in the Police Department Operations Manual currently protect plaintiff Romero from discrimination on the basis of her sexual orientation. Following enactment of Amendment 2, Plaintiff Romero will lose these protections and face the real,

immediate and substantial risk of discrimination in her employment on the basis of sexual orientation.

21. An executive order issued by Governor Roy Romer and dated December 10, 1990, and policy 11-1 of the Code of Colorado Regulations currently protects plaintiff Brown from discrimination in his employment. Following enactment of Amendment 2, Plaintiff Brown will lose these protections and face the real, immediate and substantial risk of discrimination in his employment on the basis of his sexual orientation.

22. On November 28, 1977, the City of Aspen, by and through the City Council for the City of Aspen, adopted Ordinance No. 60 (Series of 1977) prohibiting discrimination in employment, housing, public services and public accommodations within the City of Aspen on the bases of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicap, affectional or sexual orientation, family responsibility, or political affiliation. The ordinance has been codified in section 13-98 of the Aspen Municipal Code.

23. Section 13-98 of the Aspen Municipal Code prohibits discrimination on the basis of sexual orientation in housing, employment, public services and accommodations. Amendment 2 purports to repeal these provisions as they apply to gay men, lesbians and bisexuals. If Amendment 2 repeals this section as it applies to lesbians Plaintiff Navratilova will face the real, immediate and substantial risk of discrimination on the basis of her sexual orientation in housing, public services and accommodations.

24. Following enactment of Amendment 2, local government bodies will not be able to adopt or enforce ordinances or regulations prohibiting discrimination against gay, lesbian or bisexual citizens.

25. Sections 12-1-2 through 4 of the Boulder Revised Code prohibit discrimination on the basis of sexual orientation in housing, employment and public accommodations. Amendment 2 purports to repeal these provisions as they apply to gay men, lesbians and bisexuals. If Amendment 2 so repeals these sections, plaintiff Inkpen will face the real, immediate and substantial risk of discrimination on the basis of her sexual orientation in housing, employment and public accommodations.

26. Policy JFH, Student Complaints and Grievances, was adopted by the School District's Board of Education on June 18, 1992. Its implementing regulation was issued on the same date. Together, Policy JFH and its implementing regulation declare that no student shall be subjected to discrimination. They establish a procedure which, in pertinent part, affords aggrieved students the right to seek redress for alleged discrimination expressly including discrimination based on sexual orientation. Amendment 2 will prevent the School District from enforcing Policy JFH and its implementing regulation.

27. Following enactment of Amendment 2, heterosexual persons will be able to avail themselves of the above stated protections against discrimination on the basis of sexual orientation provided that the discrimination is not based on a perception that such persons are gay, lesbian or bisexual, but gay men, lesbians and bisexuals or persons so perceived will not be able to avail themselves of the protections.

28. The defendants are state officials acting under the color of state law within the meaning of 42 U.S.C. § 1983.

29. Following enactment of Amendment 2, plaintiffs will be deterred from associating in ways consistent with their sexual orientation.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Equal Protection Clause

30. Plaintiffs incorporate by reference paragraphs 1 through 29.

31. Amendment 2 purports to forbid the courts of the State of Colorado from enforcing local ordinances, federal or state statutes or constitutional provisions that recognize or protect gay men, lesbians or bisexuals.

32. Amendment 2 affirmatively authorizes, encourages and may require public and private discrimination on the basis of actual or perceived gay, lesbian and bisexual orientation and establishes the right to discriminate against gay men, lesbians and bisexuals as one of the basic policies of the State of Colorado.

33. Amendment 2 places substantial and unique burdens on gay men, lesbians and bisexuals to obtain legislation, executive policies and judicial determinations in their interest in state, municipal or school district forums regardless of the merits or, or need for, such legislation, policies or determinations and creates classifications that impinge upon the fundamental rights to vote and to participate equally in the political process. This diminished status and resulting stigma does not extend to any other group or class of citizens under the laws or constitution of the State of Colorado.

34. For the above stated reasons, Amendment 2 deprives the plaintiffs of their rights to equal protection of the laws as protected by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983,

and by the Due Process Clause in Article II, Section 25 of the Colorado Constitution.

SECOND CLAIM FOR RELIEF

Freedom of Association and Expression

35. Plaintiffs incorporate by reference paragraphs 1 through 34.

36. Amendment 2 disadvantages and discriminates against persons who hold a particular point of view by excluding a particular idea or belief about sexual orientation from being acted on through normal legislative, executive and judicial processes in Colorado.

37. Amendment 2 has the purpose and effect of limiting meaningful individual and collective advocacy of political, social and economic change on behalf of gay men, lesbians and bisexuals in securing equal rights for these persons.

38. Amendment 2 has the purpose and effect of coercing persons to adhere or profess to adhere to a single, state-approved belief respecting gay, lesbian or bisexual orientation.

39. By affirmatively authorizing and encouraging discrimination on the basis of gay, lesbian or bisexual orientation, Amendment 2 chills the speech of those persons who would otherwise freely speak out on matters related to gay, lesbian or bisexual orientation.

40. For the above stated reasons, Amendment 2 violates the plaintiffs' rights under the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

THIRD CLAIM FOR RELIEF

Establishment Clause

41. Plaintiffs incorporate by reference paragraphs 1 through 40.

42. Amendment 2 is based upon and embodies a particular religious view regarding gay, lesbian and bisexual orientation. The primary effect of Amendment 2 is to advance a particular religious belief with respect to sexual orientation.

43. Amendment 2 has no secular purpose. Instead, its purpose, and primary effect, is to advance a particular religious belief.

44. For the above stated reasons, Amendment 2 violates the plaintiffs' rights under the First Amendment to the United States Constitution and Article II, Section 4 of the Colorado Constitution.

FOURTH CLAIM FOR RELIEF

Petition Clause

45. Plaintiffs incorporate by reference paragraphs 1 through 44.

46. Amendment 2 denies plaintiffs the fundamental right to petition their government for a redress of grievances in violation of the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

FIFTH CLAIM FOR RELIEF

Vagueness

47. Plaintiffs incorporate by reference paragraphs 1 through 46.

48. Amendment 2 neither defines its own terms, nor specifies the intended sweep of its prohibitions.

49. Plaintiffs and others are forced to guess as to Amendment 2's scope and meaning, and will thereby be deterred from engaging in lawful and constitutionally protected activities.

50. Amendment 2 invites subjective, arbitrary, and viewpoint-based enforcement.

51. By imposing impermissibly vague prohibitions, Amendment 2 on its face violates the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution, as well as the Due Process Clause of Article II, Section 25 of the Colorado Constitution and Article II, Section 4 of the Colorado Constitution.

SIXTH CLAIM FOR RELIEF

Republican Form of Government

52. Plaintiffs incorporate by reference paragraphs 1 through 51.

53. By allowing Colorado voters to deprive plaintiffs of certain fundamental rights, as elsewhere alleged in this complaint, the use of the initiative as a means for adopting Amendment 2 is a violation of Article IV, Section 4 of the

United States Constitution, under which each state and the citizens of each state, are guaranteed a republican form of government, and of the Enabling Act to the Colorado Constitution that also guarantees to the plaintiffs a republican form of government.

SEVENTH CLAIM FOR RELIEF

Limits on Initiative

54. Plaintiffs incorporate by reference paragraphs 1 through 53.

55. An initiated constitutional amendment that places certain legislation beyond the reach of the general assembly violates Article V, section 1(4) of the Colorado Constitution, which provides that "[t]his section [reserving to the people the power to initiate amendments to the constitution] shall not be construed to deprive the general assembly of the power to enact any measure."

56. By purporting to limit the home rule powers of Article XX, as well as various individual rights protected by Article II of the Colorado Constitution, Amendment 2 constitutes a revision to the constitution which may only be effected through the constitutional convention process provided in Article XIX, Section 1 of the Colorado Constitution.

EIGHTH CLAIM FOR RELIEF

Article XX of the Colorado Constitution

57. Plaintiffs incorporate by reference paragraphs 1 through 56.

58. The cities of Denver, Aspen and Boulder have exercised the home rule powers granted to them by Section 6 of Article XX of the Colorado constitution to prohibit discrimination based on sexual orientation in various settings. A construction purporting to void these ordinances as they apply to gay men, lesbians and bisexuals would be in conflict with the limitation stated in Article XX of the Colorado Constitution.

59. A constitutional amendment placing certain legislation, regulations and policies beyond the reach of municipalities when such legislation, regulations and policies are required by local conditions would usurp the powers granted to home rule cities by Article XX, Section 6 of the Colorado Constitution. Article XX protects those powers except when there is an explicit declaration to the contrary. Amendment 2 is not such a declaration.

60. Article XX of the Colorado Constitution, enacted in 1902 and establishing home rule authority, operates as an implied limitation on Article V, which reserves to the people the power to initiate amendments to the constitution, enacted as part of the original constitution in 1876.

NINTH CLAIM FOR RELIEF

Article IX, Section 15 of the Colorado Constitution

61. Plaintiffs incorporate by reference paragraphs 1 through 60.

62. Article IX, Section 15 of the Colorado Constitution vests in local boards of education the authority to control instruction in the public schools of their respective districts. Local control by district boards of education is the focus of historical development of public education in Colorado.

63. Among the express duties charged to local boards of education is the duty to adopt written policies, rules and regulations relating to conduct, safety and welfare of all pupils, or any class of pupils enrolled in the public schools. C.R.S. Section 22-32-109(1)(w).

64. In exercising its constitutional authority to control instruction and in fulfilling its duty to adopt policies and regulations concerning the conduct, safety and welfare of all pupils, the School District has established the right of students to seek redress for alleged discrimination based on sexual orientation.

65. By purporting to nullify that part of the School District's policy and regulation proscribing discrimination based on sexual orientation, Amendment 2 divests the School District, acting through its Board of Education, of its constitutional and statutory authority to exercise local control over the School District in violation of Article IX, Section 15 of the Colorado Constitution.

TENTH CLAIM FOR RELIEF

Supremacy Clause and Access to Courts

66. Plaintiffs incorporate by reference paragraphs 1 through 65.

67. Amendment 2 prevents state courts from enforcing statutes, regulations, ordinances and policies whereby gay, lesbian or bisexual orientation, conduct, practices or relationships are the basis of a claim of discrimination.

68. Amendment 2 prevents state courts and municipal courts from hearing cases raising claims or defenses that involve federal or state statutes, local ordinances and policies, or constitutional provisions that recognize or protect

existing or future rights of gay men, lesbians or bisexuals. Amendment 2 places the state government and municipalities in the position of incurring legal liability for violation of the constitutional provisions.

69. For the above stated reasons, Amendment 2 violates the Supremacy Clause of Article VI, paragraph 2 of the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the access to the courts provision of the Colorado Constitution, Article II, Section 6.

ELEVENTH CLAIM FOR RELIEF

Limitation on Amendments to State Constitution

70. Plaintiffs incorporate by reference paragraphs 1 through 69.

71. Although the People of the State of Colorado retain the power to amend the state constitution, the state constitution prohibits an amendment that conflicts with the federal constitution. Amendment 2 conflicts with the federal constitution.

72. Amendment 2 unlawfully attempts to limit the constitutional authority of home rule cities as granted under Article XX of the Colorado Constitution to adopt and enforce legislation or regulations protecting rights as granted to citizens under the Constitution of the United States, including legislation and regulations prohibiting discrimination within their municipal boundaries on the basis of sexual orientation.

73. For the above stated reasons, Amendment 2 violates Article II, Section 2 of the Colorado Constitution.

WHEREFORE, the plaintiffs pray for relief and judgment as follows:

A. to declare that Amendment 2 to Article II of the Colorado Constitution violates the United States Constitution, 42 U.S.C. § 1983, and the Colorado Constitution on the above enumerated grounds;

B. to enjoin defendant Romer from proclaiming the vote which would otherwise give effect to Amendment 2;

C. to enjoin defendant Romer from enforcing Amendment 2;

D. to enjoin defendant Norton from enforcing Amendment 2;

E. to enjoin defendant State of Colorado, including its branches, departments, agencies, political subdivisions, municipalities and school districts from in any way enforcing, recognizing or giving effect to Amendment 2.

F. to declare that the protections adopted by various state and local governmental entities prohibiting discrimination on the basis of sexual orientation remain in force as adopted by the respective entities;

G. for costs, expert witness fees, and attorneys' fees as may be allowed by law; and

H. for such other and further relief as the Court deems just and proper.

Respectfully submitted this 23rd day of December, 1992.

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PLAINTIFFS' EXHIBIT 46

STATE OF COLORADO

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471

Roy Romer
Governor

EXECUTIVE ORDER

IN CELEBRATION OF HUMAN RIGHTS

WHEREAS, in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form;

WHEREAS, freedom from discrimination is the policy of state government;

WHEREAS, the State of Colorado must continue to take positive steps to ensure non-discrimination, and assure that all citizens, regardless of race, ethnicity, gender, sexual orientation, age, religion, or physical or mental disability, have an equal opportunity to compete for and obtain employment with the State of Colorado;

NOW, THEREFORE, I, Roy Romer, Governor of the State of Colorado, under the authority vested in me under the Constitution and laws of the State of Colorado, DO HEREBY ORDER THAT, with respect to all state employees, classified and exempt:

The head of each principal department, and the president of each institution of higher education, shall ensure non-discrimination based on race, ethnicity, gender, sexual orientation, age, religion, or physical or mental disability, in any matter pertaining to hiring, promotion, training, recruitment, and appraisal, and shall maintain an environment where only job-related criteria are used to assess employees or prospective employees of the State of Colorado.

GIVEN under my hand and the Executive Seal of the State of Colorado this 10th day of December, 1990.

/s/
Roy Romer
Governor

PLAINTIFFS' EXHIBIT 43

PART 11

UNFAIR COMPETITION - DECEPTIVE PRACTICES

10-3-1102. Definitions. As used in this part 11, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of insurance.

(2) "Insurance policy" or "insurance contract" means any contract of insurance, indemnity, medical or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person.

(2.5) Repealed, L. 81, p. 577, § 5, effective June 4, 1981.

(3) "Person" means any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, surplus line insurer, fraternal benefit society, and other legal entities engaged in the insurance business, including agents, limited insurance representatives, agencies, brokers, surplus line brokers, and adjusters. Such term shall also include medical service plans and hospital service plans regulated under parts 1 and 3 of article 16 of this title and health maintenance organizations regulated under parts 1 and 4 of article 16 of this title. Such plans and organizations shall be deemed to be engaged in the business of insurance for purposes of this part 11 only.

10-3-1103. Unfair methods of competition and unfair or deceptive acts or practices prohibited. No person shall engage in this state in any trade practice which is defined in this part 11 as, or determined pursuant to section 10-3-1107

to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

10-3-1104. Unfair methods of competition and unfair or deceptive acts or practices. (1) The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

* * * * *

(f) (VI) Inquiring about or making an investigation concerning, directly or indirectly, an applicant's, an insured's, or a beneficiary's sexual orientation in:

(A) An application for coverage; or

(B) Any investigation conducted in connection with an application for coverage;

(VII) Using information about gender, marital status, medical history, occupation, residential living arrangements, beneficiaries, zip codes, or other territorial designations to determine sexual orientation;

(VIII) Using sexual orientation in the underwriting process or in the determination of insurability;

(IX) Making adverse underwriting decisions because an applicant or an insured has demonstrated concerns related to AIDS by seeking counseling from health care professionals;

* * * * *

10-3-1107. Hearings. Whenever the commissioner has reason to believe that any person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice, whether defined or

reasonably implied in this part 11, and that a proceeding by him in respect thereto would be to the interest of the public, he shall proceed as provided in article 4 of title 24, C.R.S. Any final action by the commissioner pursuant to this section shall be subject to judicial review by the court of appeals pursuant to section 24-4-106 (11), C.R.S.

10-3-1108. Orders. (1) If, after a hearing conducted under section 10-3-1107, the commissioner determines that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, he shall reduce his findings to writing and shall issue and cause to be served on such person a copy of such findings and an order requiring such person to cease and desist from engaging in such method of competition, act, or practice, and, if such act or practice is a violation of section 10-3-1104, 10-3-1105, or 10-18-105, the commissioner may, at his discretion, order any one or more of the following:

(a) Payment of a monetary penalty of not more than one thousand dollars for each and every act or violation but not to exceed an aggregate penalty of ten thousand dollars, unless such person, being an insurer, knew or reasonably should have known he was in violation of this part 11, in which case the penalty shall not be more than five thousand dollars for each and every act or violation, but not to exceed an aggregate penalty of fifty thousand dollars in any six-month period;

(b) Suspension or revocation of the person's license if he knew or reasonably should have known he was in violation of the provisions of this part 11;

(c) Payment of a contractual claim to an insured or beneficiary pursuant to an insurance policy if the commissioner finds that the violation of this part 11 caused the failure to pay the claim, which amount shall be determined

by the commissioner at the hearing based on the testimony and evidence presented. This paragraph (c) shall not apply during the pendency of any civil action seeking a declaratory judgment concerning such claims.

(2) Any order issued by the commissioner pursuant to paragraph (c) of subsection (1) of this section may be appealed to the district court, whereupon the matter shall be tried de novo by the district court.

10-3-1109. Penalty for violation of cease and desist orders. (1) Any person who violates a cease and desist order of the commissioner issued under section 10-3-1108, and while such order is in effect, may, after notice and hearing and upon order of the commissioner, be subject, at the discretion of the commissioner, to any one or more of the following:

(a) A monetary penalty of not more than ten thousand dollars for each and every act or violation of an insurer; or a monetary penalty of not more than five hundred dollars for each and every act or violation of an individual;

(b) Suspension or revocation of such person's license.

10-3-1110. Regulations. (1) The commissioner may, after notice and hearing, as provided in article 4 of title 24, C.R.S., promulgate reasonable rules and regulations as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by sections 10-3-1104 and 10-3-1105.

* * * * *

PLAINTIFFS' EXHIBIT 59

Regulation 4-2-9

NON-DISCRIMINATORY TREATMENT OF ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) AND HUMAN IMMUNODEFICIENCY VIRUS (HIV) RELATED ILLNESS BY ISSUERS OF LIFE AND HEALTH INSURANCE

* * * * *

§ I. Authority

This regulation is promulgated under the authority of Sections 10-1-108(8), 10-1-109, 10-8-102 and 10-3-1104(1)(f)(II) Colorado Revised Statutes (C.R.S.).

History.-Eff. 1-1-88.

§ II. Purpose

The purpose of this regulation is to establish standards to assure non-discriminatory treatment with respect to AIDS and HIV Related Illness in underwriting practices, policy forms and benefit provisions utilized by entities subject to the provisions of this regulation.

History.-Eff. 1-1-88.

§ III. Scope

This regulation applies to all Commercial Insurers. Nonprofit Hospital and Health Service Corporations, Health Maintenance Organizations and Fraternal Benefit Societies issuing life and/or health insurance policies, contracts,

certificates of coverage or subscriber agreements in the State of Colorado.

History.-Eff. 1-1-88.

§ IV. Standards

A. No inquiry in an application for health or life insurance coverage, or in an investigation conducted by an insurer or an insurance support organization on its behalf in connection with an application for such coverage, shall be directed toward determining the applicant's sexual orientation.

B. Sexual orientation may not be used in the underwriting process or in the determination of insurability.

C. Insurance support organizations shall be directed by insurers not to investigate, directly or indirectly, the sexual orientation of an applicant or a beneficiary.

D. No question shall be used which is designed to establish the sexual orientation of the applicant.

* * * * *

G. Neither the marital status, the "living arrangements," the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of an applicant may be used to establish, or aid in establishing, the applicant's sexual orientation.

* * * * *

PLAINTIFFS' EXHIBIT 41

COLORADO CODE OF JUDICIAL CONDUCT
(Appendix to Chapter 24)

Revised Effective January 1, 1989

Including Amendments Received Through September 15, 1992

* * * * *

CANON 3
A Judge Should Perform the Duties of His or Her Office Impartially and Diligently

* * * * *

(9) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including, but not limited to, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

* * * * *

PLAINTIFFS' EXHIBIT 42

COLORADO RULES OF PROFESSIONAL CONDUCT
(Appendix to Chapters 18 to 20)

Adopted May 7, 1992, Effective January 1, 1993

* * * * *

RULE 1.2 SCOPE OF REPRESENTATION

* * * * *

(f) In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

[Adopted by the Supreme Court of Colorado May 7, 1992, effective January 1, 1993.]

* * * * *

PLAINTIFFS' EXHIBIT 23
(DENVER ORDINANCE)

DENVER

HUMAN RIGHTS -- PROHIBITION OF DISCRIMINATION IN EMPLOYMENT, ETC.

ARTICLE IV. PROHIBITION OF DISCRIMINATION IN EMPLOYMENT, HOUSING AND COMMERCIAL SPACE, PUBLIC ACCOMMODATIONS, EDUCATIONAL INSTITUTIONS AND HEALTH AND WELFARE SERVICES

Sec. 28-91. Intent of council.

(a) It is the intent of the council that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the city and to have an equal opportunity to participate in all aspects of life, including but not limited to employment, housing and commercial space, public accommodations, education and health and welfare services.

(b) It is the intent of the council in enacting this article to eliminate within the city discrimination by reason of race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability. Discriminatory practices as defined in this article may be subject to investigation, conciliation, administrative hearings and orders or other enforcement procedures.

(c) Except where specifically provided, the provisions of section 1-13 do not apply to this article.
(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 1, 12-2-91)

Sec. 28-92. Definitions.

The following words and terms when used in this article shall have the following meanings:

Age: A chronological age of at least forty (40) years.

Agency: The agency for human rights and community relations.

Director: The duly appointed executive director of the agency for human rights and community relations.

Educational institution: Any private educational institution, including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system or university and a business, nursing, professional, secretarial, technical or vocational school and includes an agent of an educational institution.

Employee: Any individual employed by or applying for employment with an employer.

Employer: Any person, excluding governmental entities and political subdivisions but including any agent of such entity or subdivision where the agency relationship is created by a written contract, engaged in an industry affecting commerce who has twenty (20) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year; the term shall also mean any agent of such a person.

Employment agency: Any person regularly undertaking or attempting with or without compensation to procure employees for an employer or to procure for employees

opportunities to work for an employer and includes an agent of such a person.

Labor organization: Any organization, agency, employee representation committee, group, association, or plan in which employees participate directly or indirectly and which exists for the purpose, in whole or in part, of dealing with employers, or any agent thereof, concerning grievances, labor disputes, wages, rates of pay, hours or other terms, conditions or privileges of employment and any conference, general committee, joint or system board or joint council which is subordinate to a national or international labor organization.

Marital status: The state of being married, single, divorced, separated or widowed and the usual conditions associated therewith, including parenthood.

Military status: Being or having been in the service of the military.

Physical or mental disability: A physical or mental impairment of an individual which substantially limits one (1) or more major life activities and includes a record of such impairment or being regarded as having such impairment; however, such term does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of a job or whose current alcohol abuse would constitute a direct threat to property or the safety of others; and in the areas of public accommodations or real estate transactions, such term does not include any individual who is an alcoholic and whose unreasonable conduct as a result of use of alcohol is the basis on which a covered entity acts; and such term does not include an individual who is currently engaged in the illegal

use of drugs when a covered entity acts on the basis of such use.

Place of public accommodation:

(1) As defined by section 59-2 of this code: All hostels; hotels; motels; rental rooms; rooming and/or boardinghouses; eating places; shops and stores dealing with goods or services of any kind; hospitals; recreational facilities, public parks; theaters of all kinds and any establishments licensed under chapter 7 (Amusements) of this Code.

(2) Any establishment licensed under the Colorado Liquor Code or the Colorado Beer Code; all banks, credit information services and all other financial institutions; insurance companies and establishments of insurance brokers; clinics, dental or medical; clubs and lodges; bath houses and swimming pools; commercial or public garages, public transportation as well as the stations or terminals thereof; any establishment offering travel or tour services; and public areas and public elevators of buildings and structures.

Real estate broker or salesperson: Any person licensed as such in accordance with the provisions of the Colorado Real Estate Commission.

Religious organizations or associations: Any organization affiliated with a church, synagogue, congregations, parish, brotherhood, religious corporation or any religious society engaging in the works of education, benevolence, charity or missions.

Sexual orientation: The status of an individual as to his or her heterosexuality, homosexuality or bisexuality.

Transaction in real property: Exhibiting, listing, advertising, negotiating, agreeing to transfer or transferring, whether by sale, lease, sublease, rent, assignment or other agreement, any interest in real property or improvements thereon.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-93. Discriminatory practices in employment.

(a) *Generally.* It shall be a discriminatory practice to do any of the following acts, based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual who is otherwise qualified:

(1) *By an employer:* To fail or refuse to hire an applicant or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect status as an employee; but with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job and the disability has a significant impact on the job;

(2) *By an employment agency:* To fail or refuse to refer for employment or to classify or refer for employment any individual or otherwise to discriminate against any individual; but with regard to a disability, it is not a discriminatory or an unfair employment practice for an employment agency to refuse to list and properly classify for employment or to refuse to refer an individual for employment in a known available job for which such individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the applicant from the job and the disability has a significant impact on the job;

(3) *By a labor organization:* To exclude or to expel from its membership or otherwise to discriminate against any individual or to limit, segregate, or classify its membership or fail or refuse to refer any individual to employment or to classify any individual in any way which would deprive such individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect the individual's status as an employee or as an applicant for employment; or

(4) *By an employer, employment agency, apprenticeship program, labor organization or joint labor/management council:*

a. to discriminate against any individual in admission to or employment in any program established to provide apprenticeship or other training or retraining, including an on-the-job training program; but with regard to a disability, it is not a discriminatory or an

unfair employment practice to deny or withhold the right to be admitted to or participate in any such program if there is no reasonable accommodation that can be made with regard to the disability, the disability actually disqualifies the applicant from the program and the disability has a significant impact on participation in the program; and

b. To communicate, print or publish or cause to be communicated, printed or published any notice or advertisement or use any publication form relating to employment by such employer or to membership in or any classification or referral for employment by such a labor organization or to any classification or referral for employment by such an employment agency indicating any preference, limitation, specification or distinction based on the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual.

* * * * *

(c) *Exceptions.*

(1) *Seniority system.* It shall not be considered a discriminatory practice for an employer to observe the conditions of a bona fide hiring or seniority system or a bona fide employee benefit system, such as retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this act, except that no such employee seniority system or benefit plan shall excuse the failure to hire any individual because of the age of such individual.

(2) *Elderly or physically or mentally disabled.* It shall not be discriminatory for employment to be limited to the elderly or physically or mentally disabled provided that such employment shall not discriminate among the elderly or physically or mentally disabled on the basis of other discriminatory criteria set forth in subsection (a) hereof.

(3) *Bona fide occupational classifications.* Any bona fide occupational qualifications or differentiation based on factors reasonably necessary to the normal operation of the particular employer shall not be deemed discriminatory.

(4) *Religious organizations.* This article shall not apply to employment by religious organizations or associations.

(5) *Individualized agreements.* Nothing in this section shall prohibit any employer from making individualized agreements with respect to compensation or the terms, conditions or privileges of employment for persons suffering a disability if such individualized agreement is part of a therapeutic or job-training program of no more than twenty (20) hours per week and lasting no more than eighteen (18) months.

(6) *Age; position.* It shall not be discriminatory to compel the retirement of any employee who is sixty-five (65) years of age or older who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred

compensation plan or any combination of such plans of the employer of such employee and if such plan equals in the aggregate at least forty-four thousand dollars ($44,000.00).

(7) *Sexual orientation; marital status.* With respect to sexual orientation or marital status, it shall not be discriminatory for fringe benefits, insurance coverage or any other term, condition or privilege of employment to be denied where the employee seeks coverage for an individual on the basis that the individual is their spousal equivalent.

(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 2, 12-2-91)

Sec. 28-94. Discriminatory practices in educational institutions.

(a) *Generally.* It is a discriminatory practice for an educational institution to deny or restrict or to abridge or condition the use of or access to any of its facilities and services to any person otherwise qualified or to discriminate based on the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual.

(b) *Exceptions.* It shall not be a discriminatory practice for admissions to be limited to persons with physical or mental disabilities, of specific religions or gender; except that when any of the above exempted colleges offers a course nowhere else available in the city, opportunity for admission to that course must be open to students of both sexes who otherwise meet lawful requirements for admission.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-95. Discriminatory practices in real estate transactions.

(a) It shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual:

(1) To interrupt or terminate or refuse to initiate or conduct any transaction in real property or to require different terms for such transaction or to represent falsely that an interest in real property is not available for transaction;

(2) To include in the terms or conditions of a transaction in real property any clause, condition or restriction prohibited by this article;

(3) To refuse to lend money, guarantee a loan, accept a deed of trust or mortgage or otherwise refuse to make funds available for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property or impose different conditions on such financing or refuse to provide title or other insurance, relating to the ownership or use of any interest in real property;

(4) To refuse or restrict facilities, service, repairs or improvements for a tenant or lessee;

(5) To communicate, make, print or publish or cause to be communicated, made, printed or published any notice, statement or advertisement with respect to a transaction or proposed transaction in real property or financing related thereto, which notice, statement or advertisement indicates or attempts to

indicate any preference, limitation or discrimination based on race, color, religion, national origin, gender, age, sexual orientation, marital status, military status, family status or physical or mental disability of any individual;

(6) To discriminate in any financial transaction involving real property on account of the location of residence or business, i.e., to *red-line*; or

(7) To restrict or attempt to restrict housing choices or to engage in any conduct relating to the sale or rental of a dwelling that otherwise denies the rental or sale or makes it unavailable.

(b) *Exceptions.*

(1) It shall not be a discriminatory practice for a person to act in conformity with chapter 59 (Zoning) of this Code and nothing in this chapter of the Code shall supersede any provisions of chapter 59 (Zoning) of this Code.

(2) This section shall not apply to multiple-unit dwellings of not more than two (2) dwelling units where at least one (1) of the units is owner-occupied.

(3) Nothing in this section shall prohibit group homes, self-care elderly homes, special-care homes or other facilities whose use is restricted to the elderly or to individuals with physical or mental disabilities.

(4) This article shall not apply to religious organizations or associations.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-96. Discriminatory practices in places of public accommodation.

(a) It shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual:

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.

(2) To communicate, print, circulate, post or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodation will be refused, withheld from or denied an individual or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable or undesirable.

(b) *Exceptions.*

(1) It shall not be a discriminatory practice for a person to act in conformity with chapter 59 (Zoning) of this Code and nothing in this chapter of the Code shall supersede any provisions of chapter 59 (Zoning) of this Code.

(2) This section shall not apply to multiple-unit dwellings of not more than two (2) dwelling units where at least one (1) of the units is owner-occupied.

(3) Nothing in this section shall prohibit group homes, self-care elderly homes, special-care homes or other facilities whose use is restricted to the elderly or to individuals with physical or mental disabilities.

(4) This article shall not apply to religious organizations or associations.

(5) This article shall not apply to insurance risk classification.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-97. Discriminatory practices in health and welfare services.

(a) It shall be a discriminatory practice to do any of the following acts, based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability, of any individual:

(1) To communicate, publish, advertise or represent or cause to be communicated, published, advertised or represented by any health and welfare agency or owner, supervisor, staff person, director, manager or officer thereof, excluding governmental entities and political subdivisions, that any of the services, programs, benefits, facilities or privileges of any health or welfare agency are withheld from or denied to any person;

(2) For any health and welfare agency or worker, supervisor, staff person, director, manager or officer thereof, excluding governmental entities and political subdivisions, to deny or refuse to provide access to any of the services, programs, benefits,

facilities or privileges of any health or welfare agency.

(b) *Exceptions.*

(1) This article shall not apply to religious organizations or associations.

(2) This article shall not apply to insurance risk classification.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-98. Coercion or retaliation.

(a) It shall be a discriminatory practice to coerce, threaten, retaliate against or interfere with any person in the exercise or enjoyment of or on account of having exercised or enjoyed or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this article.

(b) It shall be a discriminatory practice for any person to require, request or suggest that a person retaliate against, interfere with, intimidate or discriminate against a person, because that person has opposed any practice defined as discriminatory or unlawful by this article or because that person has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing authorized under this article.

(c) It shall be a discriminatory practice for any person to cause or coerce or attempt to cause or coerce, directly or indirectly, any person to prevent any person from complying with the provisions of this article.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-99. Aiding or abetting.

It shall be a discriminatory practice for any person to aid, abet, invite, compel or coerce the doing of any of the acts forbidden under the provisions of this article or to attempt to do so.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-100. Conciliation agreements.

It shall be a discriminatory practice for a party to a conciliation agreement made under the provisions of this article to violate the terms of such agreement.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-101. Resisting the agency.

It shall be unlawful for any person to willfully resist, impede or interfere with the agency, or any of its representatives in the performance of any duty under the provisions of this article or to willfully violate an order of the agency. The provisions of section 1-13 of this Code shall apply to violations of this section. Each incident shall be treated as a separate offense.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-102. Falsifying documents and testimony.

It shall be unlawful to willfully falsify documents, records or reports which are required or subpoenaed pursuant to this article or willfully to falsify testimony or to intimidate any witness or complainant. The provisions of section 1-13 of this Code shall apply to violations of this section. Each incident of such intimidation or falsification shall be treated as a separate offense.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-103. Compliance with article prerequisite for licenses.

All permits or licenses issued by or on behalf of the city shall specifically require and be conditioned upon full compliance with the provisions of this article. The failure or refusal to comply with any provision of this article shall be a proper basis for revocation of such permit or license.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-104. Posting of notice.

(a) Every person subject to this article except private residences and rental complexes of fewer than five (5) units, shall post and keep posted in a conspicuous location where business or activity is customarily conducted or negotiated a notice whose language and form have been prepared by the agency setting forth excerpts form, or summaries of, the pertinent provisions of this article and information pertinent to the filing of a complaint.

(b) It shall be a discriminatory practice for a person subject to this article to fail to post notices, maintain records, file reports as required by sections 28-105 and 28-106, or to fail to supply documents and information requested by the agency in connection with a matter under investigation.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-105. Preservation of business records.

(a) Where a charge of discrimination has been filed against a person under this article, the respondent shall preserve all records which may be relevant to the charge or action until a final disposition of the charge in accordance with subsection (b) of this section.

(b) All persons subject to this article shall furnish to the agency at the time and in the manner prescribed by the agency such reports relating to information under their control as the agency may require. The identity of persons and properties contained in reports submitted to the agency under the provisions of this section shall be kept confidential and shall not be made public. Every employer, employment agency and apprenticeship program, labor organization or joint labor/management council subject both to this article and to Title VII of the Civil Rights Act of 1964 as amended shall upon request furnish to the agency all reports that may be required by the equal employment opportunity commission established under the Civil Rights Act of 1964.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-106. Powers of agency.

(a) The agency is hereby empowered to undertake its own investigations and public hearings on any racial, religious and ethnic or other listed minority group tensions, prejudice, intolerance, bigotry and disorder and on any form of or reason for discrimination in accordance with section 28-91 against any person, for the purpose of making appropriate recommendations for action, including legislation, against such discrimination.

(b) The agency may adopt such rules and regulations as it deems necessary to effectuate and which are not in conflict with the provisions of this chapter.

(c) The agency may at its discretion choose to refer the investigation of any complaint to any other investigatory body, whether public or private, with which it shall arrange to perform such investigation.

(d) The agency may hold hearings pursuant to section 28-111, subpoena witnesses and compel their attendance,

administer oaths and take the testimony of any person under oath, and compel such respondent to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings shall comply with due process requirements.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-107. Filing of complaints.

(a) Any person may file with the agency a complaint of a violation of the provisions of this article. The complaint shall state the name and address of the person alleged to have committed the violation, who shall be called the respondent, and shall set forth the substance thereof and such other information as may be required by the agency. Any complaint under this article shall be filed with the agency within one hundred eighty (180) days of the occurrence of the discriminatory practice.

(b) Complaints filed with the agency under the provisions of this article may be voluntarily withdrawn at the request of the complainant at any time prior to the completion of the agency's investigation and findings as specified in section 28-108, except that the circumstances accompanying said withdrawal may be fully investigated by the agency.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-108. Investigation.

(a) Within fifteen (15) days of the filing of any complaint, the agency shall serve a copy thereof upon the respondent and upon all persons it deems to be necessary parties and shall arrange for prompt investigation in connection therewith.

(b) Within two hundred seventy (270) days after service of the complaint upon all parties thereto or within two hundred seventy (270) days after the completion of the investigation by any person or agency to whom the complaint has been referred for investigation, the agency shall determine whether, in accord with its own rules, it has jurisdiction and, if so, whether there is probable cause to believe that the respondent has engaged or is engaging in a discriminatory practice.

(c) If the agency finds with respect to any complaint that it lacks jurisdiction or that probable cause does not exist, the director forthwith shall issue and cause to be served on the appropriate parties an order dismissing the allegations of the complaint.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-109. Conciliation.

(a) If, in the judgment of the agency, the circumstances so warrant, it may at any time after the filing of the complaint endeavor to eliminate such discriminatory practice by conference, conciliation or persuasion.

(b) The terms of a conciliation agreement may require a respondent to refrain from committing specified discriminatory practices and to take such affirmative action as in the judgment of the agency will effectuate the purposes of this act.

(c) Upon agreement of all parties to a complaint and upon notice to all parties thereto, a conciliation agreement shall be deemed an order of the agency and shall be enforceable as such. Information concerning conciliation efforts shall be confidential.
(Ord. No. 623-90, § 2, 10-15-90)

* * * * *

Sec. 28-111. Hearings.

(a) The agency may hold a formal hearing upon a finding of probable cause to believe that discrimination has occurred. The agency shall serve upon all parties a written notice which shall state the time and place of the hearing.

(b) In accordance with rules adopted by the agency, discovery procedures may be used by the agency and the parties as provided by the Colorado Rules of Municipal Procedure after the notice of hearing has been given.

* * * * *

(e) At any such hearing, the person presenting the case in support of the complaint shall have the burden of showing that the respondent has engaged or is engaging in an unfair or discriminatory practice, and the respondent's conduct shall be presumed not to be unfair or discriminatory until proven otherwise.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-112. Decision and order.

(a) If after a hearing the agency determines that a respondent has engaged in a discriminatory practice or has otherwise violated the provisions of this article, the agency shall issue and cause to be served on such respondent a decision and order accompanied by findings of fact and conclusions of law which shall require such respondent to cease and desist from such discriminatory practice and may require such respondent to take action, including but not limited to:

(1) The hiring, reinstatement or upgrading of employees with or without back pay;

(2) The restoration to the membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program;

(3) The extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons;

(4) Appropriate injunctive relief;

(5) The payment of hearing costs as in the judgment of the agency will effectuate the purposes of this article, including a requirement for a report as to the manner of compliance with such decision and order.

(b) If upon all the evidence the agency finds that a respondent has not engaged in any discriminatory practice, the agency shall issue and cause to be served on the respondent and the complainant an order dismissing the complaint as to such respondent.
(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 3, 12-2-91)

Sec. 28-113. Judicial review.

Any person suffering a legal wrong or adversely affected or aggrieved by an order or decision of the agency in a matter pursuant to the provisions of this article is entitled to a judicial review thereof in accordance with

Colorado Rule of Civil Procedure 106 upon filing in the appropriate court a written complaint for such review.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-114. Enforcement and order.

The decision and order of the agency shall be served on the respondent with notice that, if the agency determines that the respondent has not corrected the discriminatory practice and complied with the order within thirty (30) calendar days following service of its order, the agency will conduct further enforcement proceedings.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-115. Referral to licensing agencies.

Whenever it appears that the holder of a permit or license issued by any agency or authority of the city, is a person against whom the agency after a hearing has rendered a decision and order that a discriminatory practice or a violation of this article has occurred pursuant to section 28-112, the agency, notwithstanding any other action it may take under the authority of the provisions of this article, may refer to the proper entity of the City the facts and identities of all persons involved in the complaint for such action as such agency or authority in its judgment considers appropriate based upon the facts thus disclosed to it.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-116. Effective date.

This article shall become effective February 1, 1991.
(Ord. No. 623-90, § 2, 10-15-90)

PLAINTIFFS' EXHIBIT 30
(DENVER CAREER SERVICE RULE)

RULE 19

APPEALS

Section 19-10 Actions Subject to Appeal
(Effective November 1, 1978; Rules Revision Memo 106A)

The following administrative actions relating to personnel matters shall be subject to appeal:

* * * * *

c) *Discriminatory actions*: Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, or sexual orientation. (Effective September 29, 1988; Rules Revision Memo 113B)

* * * * *

PLAINTIFFS' EXHIBIT 36

Federico Peña
Mayor

SEAL

CITY AND COUNTY OF DENVER
CITY AND COUNTY BUILDING
DENVER, COLORADO 80202

AREA CODE 303 575-2721

PROCLAMATION

WHEREAS, December 10th commemorates National Human Rights Day; and

WHEREAS, It is the policy of the City & County of Denver to see that each individual shall have equal access to municipal employment and city services; and

WHEREAS, It is the City of Denver's policy to bring about mutual understanding and respect among its individual citizens; and

WHEREAS, The City remains committed to its Affirmative Action policy and policies of non-discrimination; and

WHEREAS, Active measures to strengthen that policy will assist in the elimination of prejudice, intolerance and bigotry towards all groups:

NOW, THEREFORE, I, FEDERICO PEÑA, Mayor of the City and County of Denver, Colorado, by virtue of the authority vested in me, do hereby proclaim that it shall be the policy of this administration that:

1. There shall be no discrimination by an agency, department, commission, board or other official entity, or any official representative thereof, on the basis of race, color, creed, religion, national origin, age, sex, physical disability, mental disability or sexual preference in any matter of hiring or employment, housing, credit, contracting, provision of services, or any other matter whatsoever;

2. In order to expeditiously and effectively implement the policy set forth herein, and thereby actively seek to prevent bias and discrimination, the following measures will be undertaken:

   All department heads, supervisors and managers shall forthwith notify all employees of this Proclamation, review departmental activities, take all necessary corrective action and insure future conformity with this Proclamation;

3. The Commission on Community Relations, in accordance with provisions of Chapter 28, Section 23(1) of Denver's Revised Municipal Code, shall receive and investigate complaints of violations of the policy set forth herein and shall issue a report thereon to the Mayor and the administrative head of the city agency, department, commission, board or other official entity involved, along with a recommendation for corrective action which the Commission on Community Relations deems necessary and proper.

/s/
December 9, 1983 Federico Pena

PLAINTIFFS' EXHIBIT 32
(DENVER POLICE DEPARTMENT OPERATIONS MANUAL)

RR-128 Impartial Attitude

Members, while being vigorous and unrelenting in the enforcement of the law, must maintain a strictly impartial attitude toward complainants and violators. Members shall at all times consider it their duty to be of service to anyone who may be in danger or distress, regardless of race, color, creed, national origin, gender, age or sexual orientation.

* * * * *

RR-122 Respect for Fellow Officer

Officers shall treat other members of the department with the respect and response due to them as fellow officers. Officers shall not discriminate against one another on the basis of race, color, creed, national origin, gender, age or sexual orientation.

PLAINTIFFS' EXHIBIT 34

REV. 12-91

DENVER POLICE DEPARTMENT
OPERATIONS MANUAL

102.00 RADIO COMMUNICATIONS

102.01 How to Use the Radio

* * * * *

(6) During radio transmissions, all members are prohibited from using derogatory language relating to race, color, creed, national origin, age, sex or sexual orientation that might reasonably be regarded as offensive to any other person.

* * * * *

PLAINTIFFS' EXHIBIT 35

REV. 12-91

DENVER POLICE DEPARTMENT
OPERATIONS MANUAL

117.00 OFFICERS' RIGHTS

117.01 Officers' Bill of Rights

* * * * *

(2) Police officers shall not be discriminated against or penalized in regard to their employment because of national origin, race, creed, sex, age, religion, sexual orientation, or for any reason not related to performance or the ability to perform as professional police officers.

PLAINTIFFS' EXHIBIT 33

DENVER POLICE DEPARTMENT DIRECTIVE

TO: All Police Department Personnel

FROM: James R. Collier, Chief of Police

DATE: October 29, 1991

NUMBER: 91-13

SUBJECT: Display of Unauthorized Material

It is the policy of the Denver Police Department to prohibit the harassment or belittlement of any employee for reasons related to race, sex, age, national origin, religion, sexual orientation or any other personal characteristic.

In order to comply with this policy, please ensure that all material posted or exhibited on Departmental premises, including but not limited to walls, cabinets, bulletin boards, lockers, or other surfaces, must be non-offensive and authorized for display by the commanding officer of the facility. Anything not meeting such criteria must be immediately removed.

Examples of prohibited items include those depicting scantily-clad or unclad men or women, anything which slurs or holds up to ridicule a particular individual or group of individuals, or that has the effect of diminishing the dignity and respect we owe to each other.

Supervisors and Command Officers are responsible for ensuring compliance with this directive, effective immediately.

PLAINTIFFS' EXHIBIT 118
(BOULDER COUNTY POLICY)

NUMBER: I.13

SUBJECT: Multicultural Diversity

PURPOSE: To declare the County's commitment to multicultural diversity.

SCOPE: This policy applies to all County Departments and all employees of County Departments.

OFFICE OF PRIMARY RESPONSIBILITY: Board of County Commissioners' Office

ORIGINAL DATE: October 1, 1992

LAST REVISION: October 1, 1992

POLICY: It is an expressed goal of the Boulder County Commissioners to foster multicultural diversity in all phases of Boulder County Government. Boulder County promotes multicultural diversity in the workplace and recognizes, understands, and respects the interests and concerns of its diverse employees and citizens. Multicultural diversity, for purposes of this policy, includes race, color, religion, gender, disability, sexual orientation, age, and socio-economic status.

Boulder County is committed to a multi-culturally diverse work force, in all departments, at every level. Boulder County shall strive to design all services and operations, in every department, to serve the diverse citizens of the County. Multiculturalism shall be viewed as an integral and essential element of the County work environment, one in which great value is vested.

It is the responsibility of all County Department Heads to ensure that this goal is articulated to each employee under their supervision. It is expected that all employees exhibit behavior consistent with this policy.

PLAINTIFFS' EXHIBIT 57
(BOULDER ORDINANCE)

TITLE 12 HUMAN RIGHTS

Chapter 1 Prohibition of Discrimination in Housing, Employment, and Public Accommodations[1]

Section:

12-1-1 Definitions
12-1-2 Discrimination in Housing Prohibited
12-1-3 Discrimination in Employment Practices Prohibited
12-1-4 Discrimination in Public Accommodations Prohibited
12-1-5 Prohibitions on Retaliation for and Obstruction of Compliance with Chapter
12-1-6 Provisions of this Chapter Supplement Other Code Sections
12-1-7 City Manager may Appoint Person to Assist in Enforcement
12-1-8 Administration and Enforcement of Chapter
12-1-9 Judicial Enforcement of Chapter
12-1-10 City Contractors Shall not Discriminate
12-1-11 Authority to Adopt Rules

12-1-1 Definitions.

The following terms used in this chapter have the following meanings unless the context clearly requires otherwise:

(a) "Age" means age between forty and sixty-five years.

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[1]Adopted by Ordinance No. 4571, May 19, 1981. Amended by Ordinance Nos. 4574 and 4646. Derived from Ordinance No. 3824.

(b) "Employer" means any person employing any person in any capacity.

(c) "Employment agency" means any person undertaking, with or without compensation, to procure employees or opportunities to work for any person or holding itself out as equipped to do so.

(d) "Housing" means any building, structure, vacant land, or part thereof during the period it is advertised, listed, or offered for sale, lease, rent, or transfer of ownership, but does not include transfer of property by will or gift.[2]

(e) "Labor organization" means any organization, or committee or part thereof, that exists for the purpose in whole or in part of collective bargaining, dealing with employers concerning grievances, terms, or conditions of employment, or other mutual aid or protection in connection with employment.[3]

(f) "Martial status" means both the individual status of being single, divorced, separated, or widowed and the relational status of cohabitating and being married or unmarried.

(g) "Minor child" means a person under eighteen years of age.

(h) "Person" or "individual" means any individual, group, association, cooperation, joint apprenticeship committee, joint stock company, labor union, legal representative,

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[2]24-34-501(2), C.R.S.

[3]24-34-401(6), C.R.S.

mutual company, partnership, receiver, trustee, or unincorporated organization or other legal, commercial, or governmental entity.

(i) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such impairment. The term excludes current use of alcohol or drugs or other disabilities that prevent a person from acquiring, renting, or maintaining property, that would constitute a direct threat to the property or safety of others, or that would prevent performance of job responsibilities.

(j) "Place of accommodation" means any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind.

(k) "Sexual orientation" means the choice of sexual partners, i.e., bisexual, homosexual or heterosexual.

Ordinance Nos. 4969 (1986); 5061 (1987).

12-1-2 **Discrimination in Housing Prohibited.**[4]

(a) It is an unfair housing practice, and no person:

(1) Who has the right of ownership or possession or the right of transfer, sale, rental, or lease of any housing or any agent of such person shall:

[4]See 42 U.S.C. §§ 3604-3606.

(A) Refuse to show, sell, transfer, rent, or lease or refuse to receive and transmit any bona fide offer to buy, sell, rent, or lease or otherwise deny to or withhold from any individual such housing because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of that individual or such individual's friends or associates;

(B) Discriminate against any individual because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of the individual or such individual's friends or associates in the terms, conditions, or privileges pertaining to any facilities or services in connection with a transfer, sale, rental, or lease of housing; or

(C) Cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of an individual seeking to purchase, rent, or lease any housing or of such individual's friends or associates, but nothing in this section prohibits using a form or making a record or inquiry for the purpose of required government reporting or for a program to provide opportunities for persons who have been traditional targets of discrimination on the bases here prohibited;

(2) To whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing shall:

(A) Make or cause to be made any written or oral inquiry concerning the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of an individual seeking such financial assistance, such individual's friends or associates, or prospective occupants or tenants of such housing, or

(B) Discriminate against any individual because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual, such individual's friends or associates, or prospective occupants or tenants in the term, conditions, or privileges relating to obtaining or use of any such financial assistance;

(3) Shall include in any transfer, sale, rental, or lease of housing any restrictive covenant limiting the use of housing on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability or shall honor or exercise or attempt to honor or exercise any such restrictive covenant pertaining to housing.[1]

(4) Shall print or cause to be printed or published any notice or advertising relating to the transfer, sale, rental, or lease of any housing that indicates any preference, limitation, specification, or discrimination based on race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry,

[1]§ 24-34-502(1)(C), C.R.S.

pregnancy, parenthood, custody of a minor child, or mental or physical disability;

(5) Shall aid, abet, incite, compel, or coerce the doing of any act prohibited by this section or obstruct or prevent any person from complying with the provisions of this section or attempt either directly or indirectly to commit any act prohibited by this section;[2]

* * * * *

(7) Shall discharge, demote, or discriminate in matters of compensation against any employee or agent because of said employee's or agent's obedience to the provisions of this section;

(8) Shall:

(A) Offer, solicit, accept, use, or retain a listing of housing with the understanding that an individual may be discriminated against in the purchase, lease, or rental thereof on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual or such individual's friends or associates;

(B) Deny any individual access to or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting housing; or

(C) Discriminate against such individual on the basis of race, creed, color, sex, sexual orientation,

[2]§ 24-34-502(1)(e), C.R.S.

marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual or such individual's friends or associates.[1]

(9) Shall establish unreasonable rules or conditions of occupancy that have the effect of excluding pregnant women, parents, or households with minor children.

(b) The provisions of subsection (a) of this section do not apply to prohibit:

(1) Any religious or denominational institution or organization that is operated, supervised, or controlled by a religious or denominational organization from limiting admission or giving preference to persons of the same religion or denomination or from making such selection of buyers, lessees, or tenants as will promote a bona fide religious or denominational purpose;

(2) The owner of an owner-occupied one-family or two-family dwelling or the owner or lessor of a housing facility devoted entirely to housing individuals of one sex from limiting lessees or tenants to the members of one sex;

(3) A person who seeks to share a dwelling unit with another person from limiting lessees or tenants to members of one sex;

(4) The transfer, sale, rental, lease, or development of housing designed or intended for the use of the physically or mentally disabled, but this exclusion does not permit discrimination on the basis of race, creed,

[1]42 U.S.C. 3606.

color, sexual orientation, marital status, religion, ancestry, or national origin.[2]

(5) Compliance with any provisions of Chapters 9-3 or 10-2, B.R.C. 1981, concerning permitted occupancy of dwelling units.[3]

* * * * *

12-1-3 **Discrimination in Employment Practices Prohibited.**[1]

(a) It is a discriminatory or unfair employment practice, and no person:

(1) Shall fail or refuse to hire, shall discharge, shall promote or demote, or shall discriminate in matters of compensation, terms, conditions, or privileges of employment against any individual otherwise qualified or to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for a person to act as provided in

[2]24-34-502(5), C.R.S.

[3]24-34-501(2), C.R.S.

[1]See 42 U.S.C. 2000e.

this paragraph if there is no reasonable accommodation that such person can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job;[2]

(2) Shall refuse to list and properly classify for employment or refer an individual for employment in a known available job for which such individual is otherwise qualified because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for an employment agency to refuse to list and properly classify for employment or refuse to refer an individual for employment in a known available job for which such individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job;[3]

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[2]24-34-402(1)(a), C.R.S.

[3]24-34-402(1)(b), C.R.S.

(3) Shall exclude or expel any individual otherwise qualified from full membership rights in a labor organization, otherwise discriminate against any members of such labor organization in the full enjoyment of work opportunity, or limit, segregate, or classify its membership or applicants for membership, or classify or fail or refuse to refer for employment such individual in any way that deprives such individual of employment opportunities, limits employment opportunities, or otherwise adversely affects such individual's status as an employee or applicant for employment because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates;

(4) Shall print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership that expresses, either directly or indirectly, any limitation, specification, or discrimination on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability or intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification;

(5) Shall establish, announce, or follow a policy of denying or limiting, through a quota system or otherwise, opportunities for employment or membership in a group on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability;

(6) Shall aid, abet, incite, compel, or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice, obstruct or prevent any person from complying with the provisions of this section, or attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice;

(7) That is an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs shall discriminate against any individual on the basis of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates in admission to or employment in any program established to provide apprenticeship or other training; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice to withhold the right to be admitted to or to participate in any such program if there is no reasonable accommodation that can be made with regard to the disability, the disability actually disqualifies the individual from the program, and the disability has a significant impact on participation in the program;

(8) Shall use in the recruitment or hiring of individuals any employment agency, placement service, training school or center, labor organization, or any other employee referral source known by such person to discriminate on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability;

(9) Shall use in recruitment, hiring, upgrading, or promoting any test that such person knows or has reason

to know tends to discriminate on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability; but it is not a discriminatory or unfair employment practice to provide employment opportunities for classes of individuals that have been the traditional targets of discrimination or to use a form or make a record or inquiry for the purpose of required government reporting, and with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for a person to act as prohibited in this subsection if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job; and

(10) Seeking employment, shall publish or cause to be published an advertisement with a specification or limitation based upon race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, age, or mental or physical disability, unless based upon a bona fide occupational qualification.

(b) The provisions of subsection (a) of this section do not apply to prohibit a religious organization or institution from restricting employment opportunities to persons of the religious denomination and advertising such restriction if a bona fide religious purpose exists for the restriction.

Ordinance No. 5061 (1987).

12-1-4 **Discrimination in Public Accommodations Prohibited.***

(a) It is a discriminatory practice, and no person shall:

(1) Refuse, withhold from, or deny to any individual because of the race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, or mental or physical disability of such individual or such individual's friends or associates, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation;** or

(2) Publish, circulate, issue, display, post, or mail any written or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that such individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of the race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, or mental or physical disability of such individual or such individual's friends or associates.

(b) The provisions of subsection (a) of this section do not apply to prohibit:

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*See 42 U.S.C. 2000a.

**24-34-601(1), C.R.S.

(1) Persons from restricting admission to a place of public accommodation to individuals of one sex if such restriction bears a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation;* or

(2) Any religious or denominational institution that is operated, supervised, or controlled by a religious or denominational organization from limiting admission to persons of the same religion or denomination as will promote a bona fide religious or denominational purpose.

Ordinance No. 5061 (1987).

12-1-5 **Prohibition on Retaliation for and Obstruction of Compliance with Chapter.**

(a) No person shall use a threat, communicated by physical, oral, or written means, of harm or injury to another person, such other person's reputation, or such person's property, or discriminate against any person because such person has entered into a conciliation agreement under this chapter, because the final or any other ruling in any proceeding brought under this chapter has been in such other person's favor, because such other person has opposed a discriminatory practice, or because such other person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing before a person charged with the duty to investigate or hear complaints relating to problems of discrimination, but this section does not apply when the threat involves knowingly placing or

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*24-34-601(3), C.R.S.

attempting to place a person in fear of imminent bodily injury by use of a deadly weapon;

(b) No person shall willfully obstruct, hinder, or interfere with the performance or the proper exercise of a duty, obligation, right, or power of the city manager, the municipal court, or other official or body charged with a duty, obligation, right, or power under this chapter.

12-1-6 **Provisions of this Chapter Supplement Other Code Sections.**

Anything to the contrary notwithstanding, the substantive terms of this chapter and the remedies herein provided supplement those terms and remedies contained in this code and other ordinances of the city.

12-1-7 **City Manager may Appoint Person to Assist in Enforcement.**

The city manager may appoint a person to carry out any or all of the duties, obligations, rights, or powers under the provisions of this chapter, who may have such job title as the manager designates.

12-1-8 **Administration and Enforcement of Chapter.**

(a) Any person claiming to be aggrieved by a violation of this chapter may, within ninety days of the alleged violation or thirty days after any complaint concerning the same matter has been dismissed by another agency without a final judgment on the merits, whichever last occurs, file a written complaint under oath with the city manager . . . .

* * * * *

(d) If the city manager does not deem it practicable to attempt a pre-investigation settlement or if such settlement attempt is unsuccessful, the manager shall conduct an investigation to determine whether there is probable cause to believe the allegations of the complaint.

(1) If the city manager determines there is no probable cause, the manager shall dismiss the complaint and take no further action thereon other than that of informing the concerned persons that the complaint has been dismissed.

(2) If the city manager determines that there is a sufficient basis in fact to support the complaint, the manager shall endeavor to eliminate the alleged violation by a conciliation agreement, signed by all parties and the manager, whereunder the alleged violation is eliminated and the complainant is made whole to the greatest extent practicable.

(3) The city manager shall furnish a copy of such signed conciliation agreement to the complainant and the person charged. The terms of a conciliation agreement may be made public, but no other information relating to any complaint, its investigation, or its disposition may be disclosed without the consent of the complainant and the person charged.

* * * * *

(e) If a person who has filed a complaint with the city manager is dissatisfied with a decision by the manager to dismiss the complaint under paragraph (d)(1) of this section or if conciliation attempts as provided in paragraph (d)(2) of this section are unsuccessful to resolve the complaint, the aggrieved party may request

a hearing before the City of Boulder Human Relations Commission*, which shall hold a hearing on the matter. If the commission finds violations of this chapter, it may issue such orders as it deems appropriate to remedy the violations, including, without limitation, orders:

Ordinance No. 4879 (1984).

(1) Requiring the person found to have violated this chapter to cease and desist from the discriminatory practice;

(2) Providing for the sale, exchange, lease, rental, assignment, or sublease of housing to a particular person;

(3) Requiring an employer to: reinstate an employee; pay backpay for discriminatory termination of employment, layoff, or denial of promotion opportunity; make an offer of employment in case of discriminatory refusal of employment; make an offer of promotion in the case of discriminatory denial of promotion opportunity; or take other appropriate equitable remedial action;

(4) Requiring that a person make available a facility of public accommodation in the case of discriminatory denial of the use of such facility;

(5) Requiring that a person found to have violated this chapter report compliance with the order or orders issued pursuant to this section; and

*Section 2-3-6, B.R.C. 1981.

(6) Requiring that a person found to have violated any provisions of this chapter make, keep, and make available to the commission such reasonable records as are relevant to determine whether such person is complying with the commission's orders.

* * * * *

12-1-9 **Judicial Enforcement of Chapter.**

(a) The city manager may file a criminal complaint in municipal court seeking the imposition of the criminal penalties provided in Section 5-2-4, B.R.C. 1981, for violations of this chapter.

(b) The city manager may seek judicial enforcement of any orders of the human relations commission.

(c) Any party aggrieved by any final action of the human relations commission may seek judicial review thereof in the District Court in and for the County of Boulder by filing a complaint for review within thirty days after the date of the final action under Colorado Rule of Civil Procedure 106(a)(4).

12-1-10 **City Contractors Shall Not Discriminate.**

The city manager shall require that all contractors providing goods or services to the city certify their compliance with the provisions of this chapter.

12-1-11 **Authority to Adopt Rules.**

The city manager and the human relations commission are authorized to adopt rules to implement the provisions of this chapter.

AFFIDAVIT OF LESLIE L. DURGIN

Leslie L. Durgin, Mayor of the City of Boulder, one of the plaintiffs in this action, being upon her oath duly sworn, deposes and says as follows:

1. I am the Mayor of the City of Boulder ("City" or "Boulder"), a plaintiff in this action and appeared as a witness at the Preliminary Injunction hearing held in January, 1993.

* * * * *

22. Although the Boulder ordinance is very broad in its application, it should be noted that, notwithstanding the statement of the Legislative Council contained in its analysis of Amendment Two, Plaintiffs' Exhibit 17, at Page 14-15, and Pastor Van's and Professor Broadus' concerns, the First Amendment's "free exercise" clause would provide protection for actions of religious groups whenever adherence to the ordinance would violate the essential religious beliefs of the group. These are the legalities, and they are supported by the City's record in enforcing the human rights ordinance since 1974. For example, when a free exercise claim was made in a sex discrimination case involving a secretary, the defense was carefully investigated before it was rejected, because there was no asserted religious belief justifying the alleged discrimination. The point is that if Pastor Van's religious convictions are such that he cannot hire a gay of lesbian as an assistant pastor, or a woman as a priest, the City will, or course, recognize those concerns. But the City will require some sort of showing, so that a secretary or a janitor might have some protection, depending on the religious convictions at issue. . . .

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26. The Boulder human rights ordinance does not require affirmative action for any protected class. The City of Boulder's affirmative action plan does not address sexual orientation, nor has anyone ever suggested to me that it should.

* * * * *

ATTACHMENTS TO AFFIDAVIT OF DEAN F. DAMON (BOULDER VALLEY SCHOOL DISTRICT MATERIAL)

STUDENT COMPLAINTS AND GRIEVANCES

It is the policy of the Board of Education that all students be treated justly and without discrimination.

Students who are aggrieved by a decision or action of school personnel that they believe to be in violation of Board policies or school rules, or they believe discriminatory in nature shall have available a procedure to inquire concerning the decision or action and to express their concerns. Such procedure shall not apply to a teacher's determination of a student's grade, unless the student believes the grade to have resulted from discrimination.

Adopted: June 18, 1992

CROSS REFS.:
- AC, Nondiscrimination
- ACA, Nondiscrimination on the Basis of Sex
- JB, Equal Education Opportunities
- JF subcodes (all relate to student rights and responsibilities)
- JG subcodes (all related to student discipline)

STUDENT COMPLAINTS AND GRIEVANCES

Students are encouraged to settle at the local school their grievances concerning decisions made or actions taken by school personnel which they believe to be in violation of Board policies or school rules, or discriminatory on the basis

of race, color, creed, marital status, national origin, gender, sexual orientation, or handicap. The purpose of the following procedure is to help a student resolve a conflict with a staff member through problem-solving techniques and dialogue.

When a student believes that s/he has experienced unjust treatment from a school staff member or needs further information to determine whether an injustice has been committed by a school staff member, s/he should discuss the matter with the staff member concerned. The student, if s/he wishes, may seek the assistance of a parent/spouse, a student from the school, or another adult who is a member of that school's staff as an advocate for the first contact. . . . The purpose of the initial level of meetings is to try to problem-solve a solution to the issue informally, not to establish culpability.

If the matter cannot be resolved informally at this initial level, the student or the student and advocate should submit an account of the concern in writing to a teacher or counselor on the school staff. (If the grievance involves the principal, the student may submit the account to a staff member at the Education Center.) This teacher/counselor becomes the Student Grievance Liaison** for this is-

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**A student has the right to ask any school staff member to assist him or her with a grievance using this procedure. However, it is strongly advised that staff members who fill the role as Student Grievance Liaisons have appropriate training in mediation and/or conflict resolution skills. Each school should develop a list of the staff persons who have been so trained, and who have agreed to serve in the role of Student Grievance Liaison. A similar list should be developed of those people housed at the Education Center who are a) willing to serve at the initial

sue. . . . The written account should state the injustice or unfairness experienced by the student with a clear description of the events which occurred including dates, locations, and the persons who were involved. The Student Grievance Liaison will investigate the facts and will meet with the student or student and advocate, and then with the other staff person named in the written account, in an effort to facilitate a mutual resolution of the problem raised. This student Grievance Liaison must attempt to resolve the issue and respond to the matters of concern within five (5) school days, unless both the student and the staff member identified in this written statement agree to extend that period.

If the issue has not been resolved through the use of the Student Grievance Liaison, and appeal to the school principal or designee for further inquiry or review may be made in writing within five (5) school days of the first level decision. The school principal or designee shall review all the facts and information and will attempt to arrive at a mutually agreeable resolution of the problem within five (5) school days. . . .

If the student has reason to believe that all the appropriate information has not been considered or that a fair resolution to the grievance has not been achieved by the school principal or designee, a final appeal may be made in writing to the Superintendent of Schools or designee within five (5) school days after the decision at the building level is made. The Superintendent shall likewise have the opportunity to review all information and will attempt to arrive at a mutually agreeable decision within a reasonable time thereafter. The decision of the Superintendent shall be final under this Policy. Policy KL (Public Complaints) provides

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level and b) willing and/or trained to serve as Student Grievance Liaisons.

a procedure for District patrons to pursue complaints concerning the application of this Policy.

It should be understood that this grievance procedure is not a due process hearing as that concept is applied in an expulsion case, for example. Accordingly, while a student may have other "witnesses" give their perceptions of the facts and present documents as part of the investigation of the incident, the student has no right to have an attorney present the case, to have a tape recording of the meeting, or to "cross-examine" adverse witnesses. . . .

To ensure the integrity of the process and to protect the privacy interests of all persons concerned, this grievance/mediation process shall be deemed to be confidential and information will not be made available to persons not having a legitimate educational interest in the record or the proceedings. . . .

Issued: June 18, 1992

Boulder Valley Public Schools, Boulder, Colorado

(PART OF DEFENDANTS' EXHIBIT C)

August 10, 1992

Jill Clark
Legislative Council
Colorado General Assembly
State Capitol, Room 029
Denver, Colorado 80203-1784

Re: Comment on analysis of Amendment 2 ballot initiative

Dear Ms. Clark:

The first version of the 1992 Amendment 2 ballot analysis contains a serious misstatement of the law in the City of Boulder. The "Local Ordinances" section of the report (page 4 of the report) states:

> "However, the Denver and Boulder ordinances exempt religious institutions and they are free to refuse to hire persons or refuse housing, social services or public accommodations to individuals based upon their sexual orientation. A similar exemption is afforded landlords for small rental units. In Boulder and Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinances."

The report's interpretation of the bona fide religious purpose exemption contained in the Boulder Human Rights Ordinance is inaccurate.

EMPLOYMENT

Section 12-1-3(b) of the ordinance (employment practices) provides:

> "The provisions of subsection (a) of the section do not apply to prohibit a religious organization or institution from restricting employment opportunities to persons of THE RELIGIOUS DENOMINATION and advertising such restriction IF A BONA FIDE RELIGIOUS PURPOSE EXISTS FOR THE RESTRICTION. (Emphasis added).

In Boulder, religious organizations may refuse to hire individuals who are not members of that same denomination or faith. But if an individual who was denied employment on that basis files a religious discrimination claim against the institution, the institution would have to show a bona fide religious purpose for requiring it's [sic] employees to be members of the same denomination. For example: A private Christian elementary school may require it's [sic] instructors to be members of the Christian faith. If a non-Christian applicant is denied employment with the institution because the applicant is not a Christian, and subsequently files a claim of religious discrimination against the school, the school would have to show a bona fide religious reason for it's [sic] requirement.

The religious exemption provision does NOT permit a religious organization to refuse to hire an individual on the basis of that person's race, creed color, sex, SEXUAL ORIENTATION, marital status, national origin, ancestry, age or mental or physical disability. Using the example of the Christian elementary school, the Boulder ordinance does NOT permit the school to refuse to hire an applicant on the basis of the applicant's race, sex, sexual orientation, etc.- even if the school claimed that hiring such a person would

be a violation of it's [sic] religious beliefs or tenets. The bona fide religious exemption is a narrow exemption, only permitting a religious organization to restrict it's [sic] hiring to individuals who are members of the same religious denomination. Religious organizations are exempted only from the Boulder ordinance's prohibition against religious discrimination, and even then, only if they can show a bona fide religious purpose for their policy.

PUBLIC ACCOMMODATIONS

Section 12-1-4(b)(2) of the Boulder Human Rights Ordinance provides that the ordinance does not prohibit the following:

> "Any religious or denominational institution that is operated, supervised, or controlled by a religious or denominational organization from limiting admission to persons of the same religion or denomination as will promote a bona fide religious or denominational purpose."

Again, this exemption is a narrow one, allowing a place of public accommodation, controlled, operated, or supervised by a religious institution, to restrict admission to persons of the same religious affiliation, if it can show the restriction promotes a bona fide religious purpose. The organization CANNOT restrict access or admission on the basis of race, creed, color, sex, SEXUAL ORIENTATION, marital status, religion, national origin, ancestry, or mental or physical disability, even if it claims that it's [sic] religious or denominational tenets require it to do so.

HOUSING

The Council's analysis of the Boulder ordinance's housing exemption states, "In Boulder and Denver, owners with rental spaces in their homes or duplexes (in which they

reside) are exempted from the ordinances." This is not an accurate statement of the law in Boulder.

Sections 12-1-2(b)(2) and (3) do not prohibit the following:

> "The owner of an owner-occupied one family or two family dwelling or the owner or lessor of a housing facility devoted entirely to housing individuals of one sex from limiting lessees or tenants to the members of one sex;"
>
> "A person who seeks to share a swelling [sic] unit with another person from limiting lessees or tenants to members of one sex;"

The exemptions to the housing discrimination prohibitions contained in the Boulder Human Rights Ordinance do not permit the relevant actors to deny housing to an individual on the basis of his or her sexual orientation. The provisions do permit persons in the circumstances set forth in the ordinance to rent or lease their premises to persons of one sex.

I hope you will incorporate this information in the second draft of your report. I am available to answer any questions the Council may have about the Boulder Human Rights Ordinance. Thank you.

Sincerely,

/s/
Dani R. Newsum
Director
Office of Human Rights

PLAINTIFFS' EXHIBIT 48
(ASPEN ORDINANCE)

Sec. 13-98. Discriminatory practices prohibited.

(a) *Definitions.*

(1) *Discrimination:* "Discrimination" or "to discriminate" means, without limitation, any act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment by any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

(2) *Housing:* "Housing" means any building, structure, vacant land or part thereof during the period it is advertised, listed or offered for sale, lease, rent or transfer of ownership, and during the period while it is being sold, leased or rented.

(3) *Public services or accommodations:* "Public services or accommodations" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages or accommodations to the public.

(4) *Person:* "Person" means any individual, firm, partnership, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor, administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal or agent, legal or personal representative, real estate broker or salesman or any agent or representative of any of the aforegoing.

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to

provide adverse, unlawful, or unequal treatment to any person in connection therewith.

(e) *Penalties and civil liability.* Any person who violates the provisions of subsections (b) through (d) hereof shall be deemed guilty of an offense and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars ($300.00) or imprisonment of not more than ninety (90) days or both such fine and imprisonment, at the discretion of the court. In addition, any person claiming to be aggrieved by an unlawful discriminatory act shall have a cause of action in any court of competent jurisdiction for compensatory damages and such other remedies as may be appropriate, including specifically the issuing of restraining orders and such temporary or permanent injunctions as are necessary to obtain complete compliance with this ordinance. In addition, the prevailing party shall be entitled to reasonable attorney fees and costs.

(f) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by the City of Aspen is in violation of this section, notwithstanding any other action it may take or may have taken under the authority of the provisions of this section, the City of Aspen may take such action regarding the temporary or permanent suspension of the violator's City of Aspen business license, permit, franchise, benefit or advantage as it consider appropriate based on the facts disclosed to it. (Ord. No. 60-1977, § 1)

AFFIDAVIT OF JOHN S. BENNETT, MAYOR OF THE CITY OF ASPEN, COLORADO

I, John S. Bennett, being first duly sworn according to law depose and state as follows as a supplement to my testimony as previously provided herein in support of the plaintiffs' motions for preliminary injunctive relief . . . .

1. I am the Mayor for the City of Aspen, Colorado, . . .

* * * * *

6. Since the adoption of the City's anti-discrimination ordinance in 1977, the City has not adopted or legislated employment or housing quotas or affirmative action programs based upon sexual orientation and none are forecast for adoption. . . .

/s/
John S. Bennett

PLAINTIFFS' EXHIBIT 117
(AURORA RULE)

1-1: EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION

The City of Aurora is an equal opportunity employer. No person shall be discriminated against because of race, religion, color, creed, sex, sexual preference, age, national origin, ancestry, marital status, political affiliation, organization membership, citizenship, or veteran's status. In addition, no person shall be discriminated against because of mental or physical handicaps unless related to a bona fide occupational qualification. The City shall develop an Affirmative Action plan which identifies the City's goals. Each Department and Division is responsible for achieving specific Affirmative Action goals.

AFFIDAVIT OF NANCY C. CARNEY

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

The undersigned affiant, being first duly sworn, deposes and states upon oath as follows:

1. My name is Nancy C. Carney. I am employed as the Director of Human Resources for the City of Aurora, Colorado. I have held this position since November 7, 1990. In my capacity as Director of Human Resources, I am responsible for the direct supervision of 26 employees including the affirmative action officer of the City of Aurora.

2. The City of Aurora, Colorado's Equal Opportunity and Affirmative Action Policy, as included in the City's Personnel Policies and Procedures Manual, was adopted by resolution of the Aurora City Council (No. R82-119) on November 8, 1982, and states the following:

1-1: EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION

The City of Aurora is an equal opportunity employer. No person shall be discriminated against because of race, religion, color, creed, sex, sexual preference, age, national origin, ancestry, marital status, political affiliation, organizational membership, citizenship, or veteran's status. In addition, no person shall be discriminated against because of mental or physical handicaps unless related to a bona fide occupational qualification. The City shall develop an

Affirmative Action plan which identifies the City's goals. Each Department and Division is responsible for achieving specific Affirmative Action goals.

3. This Policy, in this form, has been in effect since November 8, 1982. It applies only to employees of the City of Aurora, and does not offer anti-discrimination protection to the citizens of Aurora or persons employed within the private sector in the City of Aurora. While the Personnel Policies and Procedures Manual has been revised over time, no changes to Section 1-1, the Equal Opportunity and Affirmative Action Policy, have been made since it was originally adopted.

4. Pursuant to the Equal Opportunity and Affirmative Action Policy, the City of Aurora has developed an affirmative action plan with respect to to [sic] race and sex. No plan has been developed for the other classifications listed in the Policy, such as religion, color, creed, sexual preference, age, national origin, ancestry, marital status, political affiliation, organizational membership, citizenship, or veteran's status.

5. To my knowledge, there has never been a request to conduct under-utilization studies or develop an affirmative action plan with respect to sexual preference.

6. The City of Aurora seeks to recruit and retain employees based upon their qualifications for the positions being filled, without regard to the characteristics listed in Section 1-1 of the Personnel Policies and Procedures Manual, with the exception of race and sex, which are subject to the City's affirmative action plan.

7. The City of Aurora makes no inquiry to determine the sexual preference of applicants or incumbent City employees.

FURTHER: Affiant sayeth not.

/s/ NANCY C. CARNEY

October 20, 1993

TESTIMONY OF JEROME CULP

(DIRECT EXAMINATION)

* * * * *

[v. 19, p. 1391]

Q. Concerns have been expressed in this case related to this issue of remedying discrimination against groups that if proper recognition were extended to gays, lesbians, and bisexuals, that affirmative action programs would inexorably follow. Let's define some terms. Would you tell the Court what affirmative action means in the civil rights law area?

A. Yeah. Again, I think that the notion of affirmative action is a notion that has the most confusion in the public's mind. The public tends to think that any policy that has any disparate impact on racial minorities is in fact affirmative action. They include any change in existing policies of as [sic] affirmative action. And I think one can easily distinguish between remedial actions that come about because some individual has proven particularized discrimination and stronger policies that go from goals to the most strong policy, in some sense, quotas. And it's very clear constitutionally that we will only extend some of those policies if in fact people have demonstrated a kind of proof and a history that

[v. 19, p. 1392]

requires them.

So, for example, with respect to gays, lesbians, and bisexuals, it is very unlikely that one would be [sic] want to extend affirmative action policies and employment to them because they haven't suffered the same kind of discrimination in terms of access to education, in terms of access to other things, and other groups have, but that

doesn't mean that they are not discriminated against when people see them or discover that they are gay. So it seems to me that, again, this notion is a red herring. Affirmative action is a policy that causes people to act irrationally and to think irrationally instead of thinking about what the nature of the policy is.

* * * * *

PLAINTIFFS' EXHIBIT 18

THE NATIONAL LEGAL FOUNDATION
6477 College Park Square
Suite 306
P.O. Box 64845
Virginia Beach, VA 23464

Robert K. Skolrood
Executive Director

Telephone (804) 424-4242
Facsimile (804) 420-0655

13 June 1991

RE: ANALYSIS OF LANGUAGE IN AMENDMENT INITIATIVE

Tony Marco, Co-Chairman
Colorado Coalition for Family Values
P.O. Box 49792
Colorado Springs, CO 80949

Dear Tony,

Let me begin by extending my congratulations to you and the Coalition for a job well done. I say "well done" despite the fact that the initiative is still in its infancy because your organization has done so much in providing this effort with a solid foundation which gives it a real chance of success.

I have conferred with two other attorneys on the different drafts. They both have experience with civil rights legislation and they both strengthened the conclusions contained in this letter. Right off let me cut down our options; in my opinion drafts three and four should not be used. As we discussed, they contain the prohibition on legal recognition of homosexual marriages. While homosexuals

do not get far by asking the electorate for special privileges, they do get a good deal of sympathy by asking to be "treated just like everyone else." The presupposition here is that if two people love each other they ought to be able to marry, and if two men or two women "love" each other they ought to be able to marry. Since same sex marriages are not recognized in Colorado at present, I feel that the clause regarding their legal recognition hurts the initiative without really adding anything to it. This leaves us with drafts one and two.

Our first concern is the lead in sentence which begins, "NO PROTECTED STATUS . . ." The question is just what should be included in the laundry list regarding orientation. The initiative is directed against those engaged in same sex activities. The natural pair which comes to mind are homosexuals and lesbians. I believe both groups should be included. I also believe the term "bisexual" should be included for two reasons. The first is that many persons who engage in same sex relations attempt make their homosexual behavior more "normal" or legitimate by saying that they also engage in heterosexual relations. From a moral standpoint of course homosexuality and bisexuality are indistinguishable. But they are perceived differently. Second, it is possible that if bisexuals are not specifically included, then homosexuals could claim that the amendment does not apply to them because they are bisexual and not simply homosexual. For these reasons it is my opinion that all three should be included in the language of the initiative.

The language regarding the agencies of the State of Colorado appear to cover everyone in question from the state legislature to city government to the local school board. The language prohibits them from both enacting *and* enforcing such regulations which is an excellent safeguard. Finally, the language which prohibits any claim by persons in same sex relationships is the most crucial clause in the

amendment. I would note here specifically some language regarding "special privileges." We talked about including such language in the amendment and I told you I felt it was a good idea. I have reconsidered that position and feel I was in error. If language denying special privileges to homosexuals is in the amendment, it could possibly allow homosexuals to argue that they are not asking for any special privileges, just those granted to everyone else. I believe that "No Special Privileges" is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself.

The language of the amendment should prohibit homosexuals from claiming any rights regarding employment, education, housing or status. Such claims are normally sought through the vehicle of "civil rights" or through discrimination suits. The language of the proposed amendment takes away any right to such an action. The U.S. Supreme Court has already stated that the U.S. Constitution does not confer upon homosexuals a fundamental right to consensual sodomy [see *Bowers v. Hardwick*, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140(1986)], but that does not mean that Colorado could not. Remember that the ERA did not get into the Federal Constitution but it did get into the Colorado Constitution. But again, the initiative is not seeking to criminalize homosexual acts, merely to prevent them from becoming the basis for civil rights. The language in amendment, especially the phrases regarding "protected status" and "claim of discrimination" should take care of that.

In conclusion, I believe the language in the amendment should prevent the type of municipal ordinance which was attempted in Colorado Springs and elsewhere in your State. There may be some way around the language which I have not foreseen, so I certainly encourage you to seek other counsel on this matter. My hope is that this brief analysis

will be of some help in the process. If I may be of any further service to you, please do not hesitate to contact me. I remain

Very sincerely yours,

/s/
Brian M. McCormick
Staff Counsel

PLAINTIFFS' EXHIBIT 15
(CFV LETTER)

LOGO **COLORADO FOR FAMILY VALUES**

July 23, 1992

Mr. Stan Elofson
Colorado Legislative Council
029 State Capitol Building
Denver, CO 80203-1784

Dear Stan:

After a careful reading of the analysis sent to me it is evident that the writers of the analysis took great editorial privileges slanted to the pro-homosexual point of view.

I am disappointed that the writers did not stick to stating just the facts. Obviously, this issue 's very emotionally charged, and it is very difficult for both sides to stay at a level of factual evidence and not slip off into conjecture and demagoguery. My comments are not meant to be demeaning, please understand this, however, if the voters are to have a clear analysis of the amendment both sides of the issue must be straight to the point and supported with as much imperical [sic] data as possible.

Two brief examples. First, number three on the arguments for the amendment states, "Divergent sexual behavior conflicts with the moral values of certain segments of American society". This statement should be supported by some form of reliable evidence or the analysis writers should not say it. The lack of facts makes it only conjecture, and your analysis should have none of this. The second example. Number two on the against portion states, "The

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amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions." This is a statement based solely on the opinion of those opposed to amendment 2. There are many Colorado voters that vehemently disagree with it. To simply state it as fact (without any reliable evidence to support it) is demagoguery in it's [sic] purest form. I trust you can see my point.

It is very important that the voters get a clear picture of the affects [sic] of the amendment through facts. The writers of the draft were not interest in this. The work is full of catch phrases and misleading, undocumentable statements. It's not the typical excellent work that the legislative Council normally produces.

I've attached a suggested analysis, up through arguments for the amendment, that presents the straight forward [sic] facts without editorializing. I've tried to address the same topics that the original writers did. I firmly believe that some members of the crew that came to interview me are personally against amendment 2 and have inserted pro-homosexual rhetoric into the analysis. Much of it reads like it came directly off the word processor of EPOC.

There will be four people coming to Denver to discuss the analysis. Thank you for reading and considering this letter. I am looking forward to seeing you on Monday.

Sincerely,

/s/
Kevin D. Tebedo
Director

cc. Sen. Ted Strictland, Chairman
Rep. Chuck Berry, Vice Chairman

Scope of the issue:

Homosexuals, lesbians, and bisexuals claim levels of harassment and discrimination against them, in Colorado, are high enough to warrant that state, county, and city agencies classify "sexual orientation" as an additional class needing protections under civil rights laws and ordinances.

The proponents of Amendment two claim that homosexuals, lesbians and bisexuals are not discriminated against enough in housing, employment, and public accommodations to warrant adding "sexual orientation" as a protected class. The proponents also claim that "sexual orientation" does not meet the current requirements used by the U.S. Supreme Court and Federal civil rights authorities for the granting of protected class status.

Current laws and policies:

Local: Three cities -- Denver, Boulder, and Aspen -- have enacted local ordinances that ad [sic] "sexual orientation" to the list of protected classes in those municipalities.

State: Governor Romer issued an executive order (CRS 24-34-402(1)) effective January 1, 1986 - amended January 1, 1992 and April 1, 1992 - that adds to state policies against discrimination, the term "sexual orientation".

Federal: There are no federal civil rights laws or procedures that protect "sexual orientation" as a minority group or protected class. The *Civil Rights Act* of 1964 identifies race, age, gender, nationality, and religion as those classes that meet the legal requirements for protection (see definitions in this analysis).

Other states: There are, as of the writing of this analysis, seven states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Virginia, and Wisconsin) that have included "sexual orientation" in the list of protected classes in those states. The District of Columbia has also adopted an ordinance with the same affect [sic].

Impact of the proposal: Passage of amendment 2 would amend the state Constitution in Article II, section thirty, so as [sic] prohibit the state of Colorado and any of it's [sic] political subdivisions (see definitions) from adopting or enacting laws or policies that would add homosexual, lesbian, and bisexual orientations to the list of protected classes.

Because the state Constitution has precedence over city ordinances, the ordinances in Denver, Boulder, and Aspen would be repealed. As would the Governors [sic] executive orders.

Arguments for the amendment

1. Two reputable marketing studies recently conducted (Simmons & Simmons Research, July 1991, and Over-Looked Opinions, 1990) have shown that , [sic] as a class of people, homosexuals are not economically, and educationally underprivileged. While economic and educational status have nothing to do with basic civil rights allotted to United States Citizens by the Constitution, they are key issues in the granting of protections under the definition of "protected class".

According to Colorado State civil rights authorities with the Civil Rights Division and the Civil Rights Commission, the only avenue to having a claim to protection is to be given the

status of a protected class. There is no ability to claim protection without being a recognized protected class. The only way of obtaining protected class status is to meet the five designated criterion.

Proponents of amendment 2 believe that homosexuals, lesbians and bisexuals do not meet these five criterion and therefore should not be given protections accorded to protected classes. The amendment would not remove the U.S. citizenship of homosexuals and therefore leaves their basic civil rights fully intact.

2. Civil Rights has never been an issue for local debate. Article XX of the Colorado Constitution guarantees local municipalities the ability to function in *municipal affairs*. Proponents of amendment 2 feel that individual and group civil rights is not a municipal affair. The issue of "sexual orientation" is the only civil rights issue being taken to the municipal level without the benefit of federally sanctioned laws.

3. A May 1992 Time/CNN poll indicated that 54% of Americans believe that homosexual relationships between consenting adults is morally wrong. As apposed [sic] to 39% who did not feel that way. The same poll was taken in 1978 and shows that 53% felt it was morally wrong and 38% felt homosexual behavior was not. This and other similar polls call into question whether or not Coloradans accept the behavior, and consequences of said behavior, of homosexuals as something that should be legitimized by granting homosexuals a separate class status. A record number of petition signatures were collected from all over the state to allow the Colorado voters to express their point of view on the November 3, 1992 general election.

4. The proponents of Amendment 2 claim that giving protected status to "sexual orientation" would create a large

financial burden on businesses in the state. Because "sexual orientation" does not exhibit any immutable or readily definable (i.e. visual) characteristics, it is left to the word only of an individual that he/she is actually homosexual, heterosexual, or bisexual. According to professionals with the state Civil Rights Division, this poses a significant problem for any employer to know when he/she is dealing with a protected class. The proponents of Amendment 2 see this as an opportunity, for the homosexual community, to harass businesses through endless litigation. One of the five Supreme Court requirements designed to curb this type of threat is that the protected class exhibit immutable, distinguishable, readily definable characteristics that define them as a discrete group. The supporters of the amendment see this as a pertinent problem for Colorado businesses.

(PART OF DEFENDANTS' EXHIBIT C)

From the desk of . . .

JOHN N. FRANKLIN

Attorney at Law

To: Whom It May Concern
Subject: Special Class Protection or Status for "Gay Sexual Orientations"
Date: March 4, 1992

My purpose in issuing this memorandum is to state publicly, as an eight-year member of the Colorado Civil Rights Commission, and Chairman of that Commission for approximately 30 months, my considered opinion that "sexual orientation," defined as including homosexuality, bisexuality and lesbianism, does not lend itself to what is known among Civil Rights authorities as special class protection or status.

I have been an attorney since 1974, serving El Paso County in various capacities since 1978, and served with the Colorado Civil Rights Commission from 1981-1988, twice as elected Chairman, resigning that position in 1987. I now serve as Assistant El Paso County Attorney and also the County's Risk and Safety Manager. I have administered the (undecipherable) Anti-Discrimination Act for 8 years, and Federal laws including the Fair Housing Act (undecipherable) EEOC provisions. I have litigated cases in El Paso County regarding personnel issues for six years. I am intimately familiar with Civil Rights statutes; I have helped draft numerous manuals and other materials touching Civil Rights and anti-discrimination issues, and am frequently consulted by Civil Rights authorities on these issues.

Based on my experience, both as an attorney and as a visually challenged person, I am very familiar with the term

"protected class status" (a term well-defined and frequently employed by Civil Rights authorities) and all that it entails. In my field, particular categories of specially protected social classes have developed over time, classes that have demonstrated through empirical studies a need for special class protection against race, gender and handicapped discrimination, etc. Several factors play highly significant roles in the designation of these special classes.

First, means must be found to effectively define such classes. Second, such classes must be limited so that they can be effectively protected under Civil Rights laws. Third, these classes must demonstrate rational bases on which designation for special class protection may be made. If Civil Rights authorities are to specially protect a class, that class must be (1) objectively discernible enough to be obviously recognizable as a distinct class; and (2) be able to justify its need for protection, by proving discrimination through economic and other forms of disadvantage. Any class that cannot demonstrate as an entire class that it has been denied promotion, educational and cultural opportunities. etc., so as to have experienced severe disadvantage, does not have a legitimate claim to protected class status, even though individual members of the class may have suffered disadvantage to some degree.

These factors are critically important, because if a group is simply awarded special protected class status apart from discernable qualifications and demonstrated need, attention will inevitably be taken away from the legitimate claims of those who have demonstrated true need and discernable qualifications.

Therefore, let us first consider this issue of discernable qualities as it relates to homosexuality. Obviously, if a person is a woman or aged above 40, or physically challenged, it is possible to demonstrate that gender or age, or physical challenge, by universally accepted means. Handicapped protected status, for instance, is an entitlement

for those who are obviously handicapped and perceived by their employers to be so. But homosexuality would be a very subjective classification indeed to establish. How would eligibility for classification as a homosexual, bisexual or lesbian be established? Strictly on the basis of personal allegation? Would protected class coverage begin only when an individual began physically practicing homosexuality? If not, when? Unless actual sexual response is clearly demonstrated by homosexuals, how will one know, for instance, if a job applicant is truly homosexual? What might be the outcome in the case of an applicant who is not homosexual, but perceived by an employer to be so?

How would classification be decided for a bisexual? To what extent is someone bisexual? If a person had one experimental homosexual experience in youth, would that make him or her eligible for bisexual protected class status? How would it be possible to tell if a person who claimed to be homosexual on January 1, 1992, has always been homosexual since birth, or will always remain homosexual?

(Undecipherable) of considerations simply do not lend themselves to careful, prompt (undecipherable) conclude that attempting to define these sexual orientations in terms of classifications needed for protected class status -- or to effectively limit such a (undecipherable) would be extraordinarily difficult, if not impossible, and involve a process (undecipherable), but rather rooted in the realm of non-sequitur.

Second, the question of gays and demonstrated need. While there has been much discussion by gay groups about their need for protection, I do not perceive there to be enough evidence, scientific empirical or otherwise, to demonstrate that gays have been victims of discrimination to the magnitude that would warrant the intrusion of government protection of their interests as a class.

Therefore, unless gays can (1) establish through impartial, scientific means that there are verifiable differences between themselves and other people -- differences which are obviously discernible to public perception -- and unless gays can (2) demonstrate clearly that gays as an entire class have suffered discrimination resulting in severe economic, educational and cultural disadvantage, it is my opinion that they should not be regarded as a specially protected class.

Absent such evidence, I fear that giving gays special, protected status as a vaguely-defined "quasi-class," would, in effect, "muddy the waters," diluting the principles of Civil Rights that have been proven through the years. It is my opinion that all specially protected classes would then suffer for the marginable, questionable gains that would be enjoyed by this vocal few.

I foresee several possible negative consequences of granting protected class status to gays. Would this precedent not encourage others of different sexual orientations, even an entire "commune," to say, "Aren't we a 'family,' too? We're all 'domestic partners.' Why shouldn't we have 'domestic partnership' benefits?" Or, what would prevent heterosexual housemates who aren't married from benefiting from their "domestic partnership" under laws granting protected class status to gays?

Under such laws, it is possible that people who aren't gay might well pretend to be gay, to form "shell" corporations attempting to take advantage of minority contract laws. If gays were made a specially protected class, it could be argued that they be given a certain percentage of such contracts, to make up for past wrongs. I fear that those who are already economically advantaged would thus be given leverage to achieve even greater economic advantage, at the expense of those who are truly disadvantaged.

The resources America now has to bestow on disadvantaged people are well directed toward the protection of currently established classes. I think granting gays special protected status would do a disservice to all those people who are presently being discriminated against or mistreated by diluting the significance of Civil Rights protection. I see no need to elevate gays to the status of a specially protected class on the mere basis that gays' lifestyle or how they have sex is not generally approved by society. And I would hate to see resources taken away from those who are truly in need of special protection, to benefit gays, who, as a class, are not disadvantaged, in my opinion.

Lastly, gays already have established recourse against discrimination. They have the right to pursue civil litigation if they have been defamed or held up to ridicule. They are protected against verbal abuse by harassment laws. They are entitled under current laws to protection of their own property and persons. They are entitled to protection by all the criminal laws of this State.

The basic Civil Rights laws of this country protect all people for basic due process. While gays are not currently elevated to the status of a specially protected class, they do have the same basic protections as all Americans. And I do not believe that either current special class protections given disadvantaged minorities or basic Civil Rights protections enjoyed by all Americans will be threatened if gays are not granted special protected class status in the foreseeable future.

/s/
John N. Franklin
Attorney At Law
Past Chairman, Colorado Civil Rights Commission

520-6485

AFFIDAVIT OF JOHN GILLESPIE

I, John Gillespie, being first duly sworn, depose and state the following from my personal knowledge:

1. I am the Executive Director, Rawhide Boys' Ranch, Route 1, New London, Wisconsin 54961, telephone (414) 982-6100. Rawhide Boy's Ranch is located in a rural Wisconsin area.

2. I am submitting this affidavit to illustrate the extreme position taken by gays and lesbians on the subject of civil rights. I believe, based on my personal experiences, that that position is injurious. I do not wish for any other organizations or individuals, including those in Colorado, to experience what I describe in detail below.

3. I have acted as Executive Director of Rawhide Boys' Ranch since it was established in 1965.

4. Rawhide Boys' Ranch was established by myself, my wife, Jan Gillespie, and Bart and Cherry Starr.

5. Since it was established, Rawhide Boys' Ranch has operated for the purpose of rehabilitating boys who have been adjudicated as being delinquents. Boys enrolled at Rawhide Boys' Ranch are boys with extensive juvenile court backgrounds. They commonly have a history of criminal assault and battery, drug abuse, car theft, breaking and entering, or even homicide.

6. The method employed by the Rawhide Boys' Ranch to rehabilitate the boys emphasizes the use of a model traditional Christian family lifestyle. A brochure publish [sic] by Rawhide Boys' Ranch is attached as Appendix 1. This includes married heterosexual couples, senior residential instructors, residential instructors, and a director of social

services. Job descriptions for each of these positions are attached to this affidavit as Appendices 2-6.

7. The boys are placed in a family-type environment in which they are supervised by the houseparents and a residential instructor. In this environment, among other things, the boys are taught morality and values based on Christian principles. For example, they are taught sexual abstinence until marriage, that drug abuse is bad, and that extra-marital sexual relations are wrong. The boys also receive a conventional education (equivalent to public school education) and certain vocational training.

8. The average boy is 15 1/2 years of age. The range of ages of boys enrolled is 13 to 18 years of age. Rawhide Boys' Ranch is licensed to receive up to 30 boys at a time.

9. Rawhide Boys' Ranch employees a staff of approximately 35, including counselors and high school teachers.

10. Typically, the boys come from a single-parent family and have little or no church background. Most of the parents or guardians of the boys want the child to receive exposure to religion. Therefore, only with the express permission of a boy's parent or guardian, the boys are taken to church. If a particular church is requested, Rawhide Boys' Ranch makes the necessary arrangements to satisfy the request.

11. For the period 1974-1991, none of over 77 percent of the boys that were enrolled in Rawhide Boys' Ranch for a period of at least 12 months had been incarcerated.

12. Boys are referred to the Rawhide Boys' Ranch by the counties located within the State of Wisconsin. Enrollees are accepted on a first come, first serve basis. A typical

enrollee is a teenage boy that is both physically and emotionally aggressive.

13. Under the 1982 Wisconsin Fair Employment Act ("Act"), copy attached as Appendix 7, employment decisions based on marital status or sexual orientation were prohibited. Under the Act, for example, in my opinion, certain actions taken by the Catholic church would be illegal.

14. In the early 1980s, Dane County, Wisconsin, mailed Rawhide Boys' Ranch a questionnaire which sought information concerning Rawhide Boys' Ranch's employment practices as they may concern employment decisions based on marital status, sex, and sexual orientation. Rawhide Boys' Ranch responded by indicating that marital status, sex and sexual orientation were factors on which it based some of its staffing employment decisions. For example, Rawhide Boys' Ranch stated that it only employed heterosexual couples that had been married for at least 5 years to serve as houseparents.

15. Apparently, the questionnaire was forwarded to then Governor Anthony Earl's Commission for Gay and Lesbian Rights. The Commission asked the Wisconsin Department of Social Services to revoke Rawhide Boys' Ranch's license on the basis of the allegation that the Rawhide Boys' Ranch violated the Act.

16. Soon thereafter, State Senator Joe Leean obtained a copy of the Commission's meeting minutes describing a Commission plan to cause a gay or lesbian to seek employment at the Rawhide Boys' Ranch. It was expected that employment would be denied and the individual could then cause a civil rights action to be lodged against Rawhide Boys' Ranch. A copy of the minutes is attached as Appendix 8. The news media discovered the minutes and the matter became highly publicized. See, for example,

attached copies of newspaper articles attached as Appendices 9-15.

17. Gay and lesbian rights advocates alleged that Rawhide Boys' Ranch was anti-gay or anti-lesbian. This was false. Rawhide Boys' Ranch emphasizes traditional family values; it is not anti-gay or anti-lesbian. The Rawhide Boys' Ranch's philosophy is that parents should be allowed to determine what is best for their children.

18. The debate over whether or not Rawhide Boys' Ranch was in violation of the Act led to an attempt to obtain legislation that would exempt Rawhide Boys' Ranch from the Act.

19. Rawhide Boys' Ranch spent approximately $250,000.00* to engage in mailings, produce a video, and retain the services of an individual to tour and speak out in support of an exemption for Rawhide Boys' Ranch. It was believed that without the exemption, Rawhide Boys' Ranch would have to close.

20. Finally, in February 1988 and after years of lobbying and despite opposition from Lambda Rights Network, see Appendix 16, attached, Assembly Bill 916, attached as Appendix 17, was passed into law. The bill amended the Act by defining the word "creed" to mean a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views. As amended by the bill, the Act exempted the Rawhide Boys' Ranch.

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* Rawhide Boy's Ranch's 1993 revenues totalled approximately $1,035,279.00.

21. Rawhide Boys' Ranch's license has not been threatened on the basis of a state civil rights violation since the amendment was adopted.

/s/
JOHN GILLESPIE
Executive Director
Rawhide Boys' Ranch
Route 1
New London, Wisconsin 54961
(414) 982-6100

FURTHER AFFIANT SAYETH NAUGHT.

DEFENDANTS' EXHIBIT B

Talmey-Drake Research & Strategy
Project 92144
December 1992

CHANNEL 4 & THE DENVER POST
DECEMBER 1992 ISSUES SURVEY RESULTS

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5. In the last election Colorado voters also passed an amendment to the State Constitution -- Amendment 2 -- that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing. It also repealed existing laws that banned discrimination against homosexuals in employment and housing in communities that already passed such laws.

   The people who opposed Amendment 2 say the people who voted for Amendment 2 voted that way because they hate homosexuals. Others say that the people who voted for Amendment 2 were not so much against homosexuals as against laws that would give homosexuals special or protected status when it comes to housing and employment. What do you think? Do you think the majority of those who voted in favor of Amendment 2 voted that way because they hate homosexuals or because they are against laws that would give homosexuals a type of special or protected status?

Hate homosexuals	10%
Against laws	73%
Both [NO PROMPT]	7%

Other	7%
DK/NS	3%

6. Regardless of how you feel about laws that prohibit discriminating against homosexuals in housing and employment, there already exist a number of laws that prohibit discrimination against racial and ethnic minorities and women in housing and employment. While many people feel that these laws are good, many others feel that society would be better if these laws were repealed. How do you feel? Do you feel there should be laws that prohibit discrimination aganist [sic] ethnic and racial minorities in housing and employment or do you feel that society would be better if these laws were repealed?

There should be laws	74%
Should be repealed	16%
Undecided/DK/NS	10%

7. Since the passage of Amendment 2 by Colorado voters a number of homosexual rights organizations and some celebrities have called for a national boycott of Colorado until Amendment 2 is repealed. Have you seen or heard anything about this boycott of Colorado?

Yes	96%
No	4%

8. And does the call for a boycott of Colorado by homosexual rights groups make you more likely or less likely to support the repeal of Amendment 2.

More likely	25%
Less likely	43%
No difference	28%
DK/NS/Undecided	4%

9. While some people say that the boycott of Colorado will cost the state millions of dollars in lost tourism and business, others say that the boycott won't have much effect, but the publicity will actually bring more tourists and more business to Colorado. What do you think? Will the effect of the boycott hurt the state's economy or in the end will it help it?

Boycott will hurt economy	48%
Boycott will help economy	20%
Won't make any difference	25%
DK/NS	7%

10. Whether or not you feel the boycott will help or hurt Colorado's economy, do you think Colorado voters will vote in favor of repealing Amendment 2 or do you think they will vote against repealing it?

For repealing #2	36%
Against Repealing #2	49%
Undecided/DK/NS	14%
No answer/refused	1%

11. Some people say that many in the homosexual community over reacted [sic] to the passage of Amendment 2, and have actually hurt their cause. Others, however, say that a strong reaction is necessary to change peoples' minds. Again, what do you think? Has the reaction to the passage of Amendment 2 hurt the cause of gay rights in Colorado or has it helped it?

Hurt gay rights	56%
Helped it	27%
Made no difference	6%
DK/NS	11%

12. In light of the passage of Amendment 2 some people are saying that people in Colorado are more prejudiced against homosexuals than people in other states. Other people say that Coloradans are generally more tolerant than people in other states, and that if Amendment 2 had been on the ballot in other states it would have passed in most of them too. What do you think? Are people in Colorado more tolerant or less tolerant of homosexuals than people in other states.

More tolerant	48%
Less tolerant	15%
The same	25%
DK/NS	12%

13. Because of the controversy over Amendment 2, we are particularly interested in finding out how people feel about homosexuality and gay rights issues. I would now like to read you several statements about homosexuality and gay rights, [sic] After I read each statement, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the statement. If you don't have any feeling about the statement, one way or the other, just say so. If I read a statement that you would prefer not to give an opinion about, please tell me, and I will skip over it and go on to the next statement. Also throughout these statements we use the term "homosexual" to refer to both male and female homosexuals.

[PROBE TO DISTINGUISH BETWEEN "DK/NS" AND "NEUTRAL"]

[ROTATE]	--Agree--		-Disagree-		DK/
	Stng	Some	N Some	Stng	NS
[a] Homosexuals should be allowed to served					

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
in the armed forces.	41%	18%	5%	8%	22%	6%
[b] Homosexuality is morally wrong.	31%	9%	7%	12%	36%	5%
[c] A homosexual is more likely to sexually molest children than a person who is heterosexual.	4%	2%	5%	17%	61%	11%
[d] Except for their choice of sexual partners, homosexuals are not really different from anyone else.	60%	21%	1%	6%	7%	5%
[e] When homosexuals talk about gay rights, what they are really saying is that they want special treatment.	32%	22%	3%	12%	28%	3%
[f] Homosexual couples -- that is couples of the same sex -- should be allowed to adopt children.	18%	17%	9%	12%	37%	7%
[g] Most homosexuals would rather be straight, if they						

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
had a choice.	9%	10%	8%	19%	32%	22%
[h] Homosexuals shouldn't be allowed to teach in the public schools.	10%	8%	5%	21%	52%	4%
[i] Homosexual behavior should be against the law, even if it occurs between consenting adults.	9%	4%	5%	14%	64%	4%
[j] Most homosexuals could quit being gay if they really tried.	11%	8%	7%	16%	44%	14%
[k] The average person is not nearly so prejudiced against homosexuals as many gay-rights activists would want people to believe.	40%	28%	5%	13%	8%	6%

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(ATTACHMENT TO AFFIDAVIT OF PAUL TALMEY)

Talmey-Drake Research & Strategy
Project 93234 SEP93A2.%
September 1993

SEPTEMBER 1993 ISSUES

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23. In the last election Colorado voters also passed an amendment to the State Constitution -- Amendment 2 -- that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing. It also repealed existing laws that banned discrimination against homosexuals in employment and housing in communities that already passed such laws.

The people who opposed Amendment 2 say the people who voted for Amendment 2 voted that way because they hate homosexuals. Others say that the people who voted for Amendment 2 were not so much against homosexuals as against laws that would give homosexuals special or protected status when it comes to housing and employment. What do you think? Do you think the majority of those who voted in favor of Amendment 2 voted that way because they hate homosexuals or because they are against laws that would give homosexuals a type of special or protected status?

Hate homosexuals	8%
Against laws	81%
Both [NO PROMPT]	5%
Other	4%

DK/NS	2%

24. In light of the passage of Amendment 2 some people are saying that people in Colorado are more prejudiced against homosexuals than people in other states. Other people say that Coloradans are generally more tolerant than people in other states, and that if Amendment 2 had been on the ballot in other states it would have passed in most of them too. What do you think? Are people in Colorado more tolerant or less tolerant of homosexuals than people in other states.

More tolerant	52%
Less tolerant	14%
The same	25%
DK/NS	9%

25. [ASK ONLY IF Q5 = 1 (REGISTERED VOTER)] Now suppose there was an election being held today, and voters were being asked to repeal Amendment 2 -- the State Constitutional amendment that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing -- would you vote for repealing Amendment 2 or would you vote against repealing it.

For repeal	37%	
Against repeal	58%	
Undecided/DK/NS	5%	—> > SKIP TO Q26
Refused	*	—> > SKIP TO Q26

* * * * *

27. Because of the controversy over Amendment 2, we are particularly interested in finding out how people feel about homosexuality and gay rights issues. I would

now like to read you several statements about homosexuality and gay rights, [sic] After I read each statement, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the statement. If you don't have any feeling about the statement, one way or the other, just say so. If I read a statement that you would prefer not to give an opinion about, please tell me, and I will skip over it and go on to the next statement. Also throughout these statements we use the term "homosexual" to refer to both male and female homosexuals.

[PROBE TO DISTINGUISH BETWEEN "DK/NS" AND "NEUTRAL"]
[ROTATE]

	--Agree--			-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
[a] Gay rights groups are some of the most politically influential groups in the country.	23%	28%	5%	21%	14%	9%
[b] Homosexuals should be allowed to serve in the armed forces.	36%	26%	4%	11%	21%	4%
[c] The public schools should teach students that homosexual relationships are morally equal to heterosexual relationships.	8%	7%	5%	20%	55%	6%
[d] Homosexuality is morally wrong.	38%	10%	8%	13%	27%	6%

	--Agree--			-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
[e] Except for their choice of sexual partners, homosexuals are not really different from anyone else.	46%	28%	2%	11%	9%	4%
[f] The public schools should provide students with appropriate homosexual role models.	4%	7%	4%	20%	59%	6%
[g] AIDS is God's way of punishing homosexuals.	5%	6%	3%	10%	71%	6%
[h] A person is born either a homosexual or a heterosexual, and experiences while growing up have little to do with becoming one or the other.	17%	13%	7%	15%	33%	15%
[i] The federal civil rights laws should be amended to give the same protected status to homosexuals as they give to racial, and religious						

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
minorities.	16%	17%	3%	16%	44%	5%
[j] Homosexual behavior should be against the law, even if it occurs between consenting adults.	7%	8%	3%	22%	55%	5%
[k] When homosexuals talk about gay rights, what they are really saying is that they want special treatment.	35%	24%	1%	14%	21%	5%
[l] A dentist should be allowed to refuse to treat someone who has AIDS or who is HIV positive.	34%	28%	6%	12%	13%	8%
[m] An employer should have the right to fire an employee on the grounds he or she is a homosexual.	7%	6%	3%	18%	64%	3%
[n] Homosexuals should not be allowed to teach in the public schools.	13%	9%	5%	27%	43%	4%

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
[o] The government should actively discourage homosexual behavior.	17%	9%	5%	18%	47%	5%
[p] An employer should have the right to not hire someone because he or she is a homosexual.	13%	13%	2%	19%	51%	3%
[q] A landlord should have the right to evict a tenant on the grounds that he or she is a homosexual.	8%	5%	3%	22%	59%	4%
[r] Homosexuals should not be allowed to be Scout masters.	26%	14%	6%	24%	26%	5%
[s] A landlord should have the right to refuse to rent to someone because he or she is a homosexual.	13%	11%	2%	20%	51%	3%
[t] Homosexual couples should be able to become legally married.	16%	21%	9%	13%	36%	5%

	--Agree--			-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
[u] Gay rights are more about making homosexual behavior acceptable than about equal housing and employment opportunities.	38%	26%	4%	14%	12%	7%
[v] Homosexual couples -- that is couples of the same sex -- should be allowed to adopt children.	15%	16%	5%	14%	43%	7%

28. Shortly after Amendment 2 passed last November, the Denver District Court ruled that it could not be enforced until there has been a full trial. Some people say that if the courts overturn Amendment 2 it shows that the people in power in this country will pretty much run things the way they want to regardless of what the public wants. What do you think? If the courts overturn Amendment 2 does it mean that the people in power in this country pretty much run things they [sic] way they want to regardless of what the public wants, or would you think it was overturned for another reason?

People in power ignore public	47%
Other reason	43%
Both [NO PROMPT]	2%
DK/NS	8%

* * * * *

TESTIMONY OF WILFORD G. PERKINS

[v. 15, p. 712]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

Mr. Perkins, as with the other witnesses, I'll have you swing around and speak directly into that microphone. There we go. And if you speak into the flat side, it works the best.

Mr. Kay.

DIRECT EXAMINATION

BY MR. KAY:

Q. Would you state your name, please.

A. Wilford G. Perkins.

Q. Mr. Perkins, were do you live?

A. I live in Colorado Springs.

* * * * *

[v. 15, p. 713]

Q. Mr. Perkins, are you involved with an organization known as Coloradans for Family Values?

A. I am the chairman of the board.

Q. How long have you been the chairman of the board?

[v. 15, p. 714]

A. Since its inception.

Q. When was that?

A. Oh, I think we incorporated in April of '91. Approximately. I'm not sure of the exact date.

Q. How did you come to be involved with Coloradans for Family Values? And is that organization sometimes called CFV?

A. Yes, it is. And it's Colorado for Family Values. I became involved as I took part in the discussion of the human relations council in Colorado Springs promoting a change in the ordinance for the city.

Q. What kind of change was being promoted in the City of Colorado Springs ordinance?

A. Well, in substance, my initial introduction to it had nothing to do with sexual orientation. I, two years ago, sexual orientation wasn't in my vocabulary. I became interested when I saw the impact of the change in the human relations proposed ordinance that would have an impact on me as a business person, and that's what caught my interest, and that's why I originally went to the hearings that were being conducted at the council.

Q. When was this?

A. The exact date I don't recall, but it was -- it was prior to our incorporating as a Colorado for Family Values [sic]. There was no organization at that time.

[v. 15, p. 715]

Q. Let me refer you to what's tabbed under Exhibit 10 in that blue book in front of you which is in fact known as Exhibit Y for the record. Do you recognize that document?

A. Not precisely. Is this the final draft of the ordinance as it was presented to the City?

Q. I'm not sure. How many drafts were there?

A. I don't know. There were several.

Q. Do you recognize that as one of the drafts that was used with the City of Colorado Springs?

A. It says that's what it is, yes.

Q. Do you recall ever seeing that document?

A. I'm sure I did. I looked at all of them.

Q. Did you read all of those documents?

A. I read them, yes. I'm not an attorney. I read them as a lay person. And the things that caught my eye were primarily the fact that as a business person, if one of my employees filed a complaint against me even though it could even be a perceived complaint, and they in the first draft said without due recourse of law, they could make me give them any information I had in my business or home, and then the commission was the judge and jury, and frankly, I thought something like that would make a gestapo

embarrassed and I saw this as a real potential problem for business and that's what got me involved, why I want [sic] to the hearings.

Q. So you want [sic] to the city council hearings on this

[v. 15, p. 715]

particular amendment to the City's ordinances?

A. Yes. Yes, I did.

Q. Did you speak out at those hearings?

A. No. In fact, the first meeting I went to there were so many people there I couldn't even get in.

Q. Did that ordinance have anything to do with sexual orientation?

A. Yes. Sexual orientation was in the wording of it.

Q. But you were more concerned as a business person?

MS. WINER: Excuse me, Judge. I'm going to object on the leading.

THE COURT: Sustained. Form of the question. Please ask questions in a non-leading manner.

Q. (BY MR. KAY): What were you concerned about that organization?

A. I was concerned about the impact, as I stated, the potential impact of just more red tape and more problems involving this type of complaint.

Q. Did there come a time when you became concerned about the sexual orientation aspects of that ordinance?

A. Well, as I read about it in the papers and then as I began to associate more with my friends who were involved with this, prior -- this issue prior to my involvement, then I began to see the impact of the sexual orientation clause.

[v. 15, p. 717]

Q. And what did you see as the impact that you were concerned about?

A. Well, I guess I probably went through -- through the kind of emotions and thinking that probably a majority of people in Colorado on this issue is that prior to this involvement with this ordinance and the sexual orientation, sexual orientation wasn't in my vocabulary. As a business person, we've had homosexual customers. I didn't consider them a threat to anybody. We did business just like everybody else. I have homosexual acquaintances. Some celibate -- one, not a large number, one is celibate, another is practicing. I didn't -- you know, I -- it just was not an issue with me.

Q. Did you have any homosexual employees at your Chrysler dealership?

A. I don't know. I may have. I have been asked that question by reporters, and I said if I did or if there are now, they are doing a good job.

Q. Do you make sexual orientation an issue at your business?

A. No, we don't.

Q. How did your involvement in the Colorado Springs ordinance which is in front of you lead to your involvement in CFV, Colorado for Family Values?

A. Well, as I began to become better involved on

[v. 15, p. 718]

what the implications of sexual orientation and then to understand that this really was the motivating factor in this proposed ordinance, and then I began to learn that there were ordinances in Boulder and in Aspen, and along about this time they were -- there was a vote on referendum type vote in Denver that was in progress, which had not caught my attention. But I began to go through this process and listening to this whole discussion of discrimination, and as most people, I had a negative feeling about discrimination, and had a tendency, I guess, to equate it with slavery, and Black situations, and I had to -- civil rights -- I was not a civil rights expert and don't claim to be now, but I began to understand that in America, there's no blanket protection from discrimination unless you are a member of a protected class.

Well, I never thought about these kind of things. But -- and it's important to understand and I had to get this straight in my head that there has to be a difference from this protected class, and as I've studied it I understand that the Civil Rights Act of 1964 began to identify groups of people who they termed to be suspect of discrimination, and to see whether they should go into a protected class. Which of course is what this Amendment is all about. And naturally, human beings, being what we are, we would all like to have as many advantages as we can. So there had to be some kind of a criteria to determine who is worthy of a protected class

[v. 15, p. 719]

status. Because there are many many reasons where people are discriminated against in America and there is no

protection from discrimination. If you are left-handed, if you are seven feet tall and you are not a basketball player, if you are four feet tall, there are problems addressed with that, and if you are -- every job description, of course, has some discriminating factors in it, so there has to be a criteria. And we discovered that this criteria had to do with economics and education, the matter of identification, and also the fact of political influence.

And as we went through the whole research, as to the economics of this, there had to be a definite history of discrimination. I'm sorry to take so much time about this, but I had to go through this to understand it, there had to be a history of discrimination that had prevented people from making an average income. That had denied them from access to average educational opportunities. And I guess when you look at the Black American situation, back in the 50's and early 60's that there was no question, there had been a history of discrimination which prevented them as a group, not individually and not isolated instances, but as a group from having the capability of making an average income and getting adequate educational opportunities.

When they looked at the political influence, I think that's changed some since then, but at that time they were

[v. 15, p. 720]

not politically powerful enough to affect these other conditions. And then as I looked at this last classification of identification, there was -- with the exception of religion for the most part, there was a clearly identifiable immutable physical characteristic so society knew they were dealing with a protected class person and give them a higher consideration. As we looked at the homosexuals, as a group, and then we had to figure out that the only way you could tell, they would have to say they were. How do -- are they economically disadvantaged? And by their own

research they are not, and you have access to that, and we -- and one of the surveys made by a homosexual marketing research firm they showed that 20,000 sampling around the nation and they showed average income over $55,000 for homosexual households, and we knew that the average income on heterosexual and just average Americans was just $32,000 and if you look at the traditional minorities it's down around $11, $12,000. So just taking that alone they were not disadvantaged economically.

Educationally, again, they showed very high. 62 percent having college degrees as compared to 24 percent of average Americans, and 17 for females.

And 30 percent, these are approximations, but 30 percent had advanced degrees. So they weren't disadvantaged. There had to have been no history of discrimination in those areas that affected those two.

[v. 15, p. 721]

Q. You are not saying that there was no --

MS. WINER: Excuse me, Judge, but I'm going to object to the leading.

THE COURT: Yes. Questions that start "you are not stating" are leading questions. Please rephrase.

Q. (BY MR. KAY): Did you consider whether they had been discriminated against other than economically and educationally in your analysis?

A. Well, what we concentrated on was the protected class status. You know, discrimination takes forms in a lot of things. As an [sic] used car salesman I have experienced discrimination. You know, I can do something about what

people think of me as a used car salesmen who do business with me, but as an industry, unfortunately, we have earned our reputation, and it's not a good one.

Now, does that mean I should go to the city council and ask them to write an ordinance to give me more respect because I suffer discrimination? I didn't see any connection by the fact that there is discrimination. We have to look at does that discrimination impact a group of people to the extent they deserve protected class status and the criteria that has been used up to this point doesn't say so. Now that's my impression.

Q. Did you look at whether they had been subject to name calling or gay bashing as people have termed it in

[v. 15, p. 722]

the past?

A. Well, it's my opinion and I think it's a matter of fact that if someone is -- if a homosexual is harmed physically or threatened or their property damaged, somebody is breaking the law, and they ought to be apprehended and prosecuted. No question about that. Now, if that's taking place and someone is breaking the law, they should be prosecuted.

Q. You looked at education and income?

A. And we also looked at the idea of political influence.

Q. What did you find there?

A. Well, I can tell you -- before the campaign started, I was pretty naive about that, but I knew just looking at what was going on in this nation that political influence is

demonstrated everyday [sic]. Later in the campaign, I got a better education on that. But I think --

Q. Political influences everyday [sic] by whom?

A. There's no question about they are very politically affluent, very politically affluent.

Q. You are talking about the gay and lesbians?

A. I am talking about the gay and lesbian community, however you want to identify them.

Q. How do you identify them?

A. Well, it's a problem. But basically if somebody

[v. 15, p. 723]

tells me they are homosexual, I assume they are. And I would say that it basically is the desire to have sex with that someone of the same gender.

Q. How do you identify them as a group?

A. I can't. I mean they can form together, I guess, and present themselves as a group. But it's a self identification. That's one of the problems.

Q. Have they done that? Have they gotten together in groups that you know of?

A. Yes, they have. The national gay and lesbian task force is one of the most influential PAC groups in America. So they -- when they identify themselves and join organizations that say this is what they are, what they propose, I guess you have to say, yeah, that must be it.

Q. What else did you do in your analysis on the sexual orientation issue as it relates to suspect class or protected class?

A. Well, this identification is a very important one, because as I looked at that as a business person, if it became an advantage to be homosexual, then also one would have to say, well, I'm homosexual and if you used the term sexual orientation and put it in a protected class, then it means that every time a business person makes a personnel decision, they open themselves to the potential problem of being confronted with I didn't get that job because I was homosexual or I didn't

[v. 15, p. 724]

get that job because I'm heterosexual or I didn't get that promotion or I didn't get the raise or what have you, and all based on whatever they described themselves as being. And now, that doesn't mean they would always win the lawsuit. But it means you would always have to defend yourselv and you would always face the possibility of losing a case like in any of those matters. So as a business person that was extremely important to me.

Q. Any other analysis you did on the protected class status and whether it should or should not be granted to -- on the basis of sexual orientation?

A. Yes. As we looked at the history of this civil rights matter and sexual orientation, who we discovered through the last 16, 17 years that the National Gay and Lesbian Task Force or some other organizations with same motivation have been promoting legislation in Congress which would include sexual orientation as a protected class under the Civil Rights Act of '64. And as we thought about it, and as it dies in committee, it has every year, and I think for a very good reason, the reason being that sexual orientation is everybody. All the time, every situation. Now, to

assume -- and this is what we used in our campaign, the special right of protected class status is a special right. Because everybody doesn't have it in every situation. Now, if everybody has this special right in every situation, then who has a special right? And the

[v. 15, p. 725]

answer is nobody. And who loses in that group? The losers are the very people for whom the Civil Rights Act was initiated. People who -- groups in society that needed a leg up to get started in education, jobs, employment, through affirmative action. These are all parts of it making the protected class status work. And personally I am very much in favor of civil rights. I am very much in favor of groups of people who need a leg up in society getting the opportunity. And I see this as a real threat to the purpose of the Civil Rights Act in 1964.

Q. And --

A. If they were to include sexual orientation.

Q. -- any other analysis you did on this issue?

A. Well, there was a lot of detail work that was done and some of the other fellows could probably address better than I.

Q. Let's talk about that. Who are the other people involved in CFV at its inception?

A. Well, the two founders of CFV and two people that were I think most instrumental were Kevin Tebedo and Tony Marco.

Q. How did you come to be involved with those two and their organization known as Colorado for Family Values?

A. Well, Kevin I did not know. Perhaps I had met sometime [sic]. I know his family. I had done business with his family and with his mother in particular.

[v. 15, p. 726]

Q. His mother is a state legislature [sic]?

A. Yes, she is a state senator. I had known her through other political work. And Tony, I had a slight acquaintance with in that we went to the same church. We were not -- we just went to the same church and had known each other.

Q. Let me ask you was CFV formed as a religious organization or a religious right organization?

A. Well, we have been confronted with that question on many many times, and if you look at the Amendment, it doesn't say anything about immorality or morality or criminalization or anything like that. It addresses protected class status. Now, people approach the idea of Amendment 2, many people do, from a religious persuasion. People on both sides of the issue. Some say it's a bad deal. Some say it's a good deal. We did not -- Amendment 2 is not a religious issue, as a piece of legislation, even though some people approach it in that manner. It's a matter of protected class status, and that's the issue that we argue.

Q. Is it a religious issue to you?

A. I would come from a religious persuasion, because my faith is very important to me. But that is not the thrust of the amendment. Even though someone approaches it from a religious prospective on the opposing view they can be just genuinely sincere about that. We argued this primarily from a

[v. 15, p. 727]

civil rights status. Now, in certain environments where we were sending information to churches or pastors, we made reference to religious issues because that was a -- that was their interest. But, if you were to look at our radio spots, or you look at our television spots during the campaign, it doesn't address that at all. We do make some reference to that in the tabloid that we used during the campaign, but as I say, in a political campaign you look at the market that you are appealing to with whatever the media you are using, and that's the way you present it, and that's the way we did.

Q. So you did have some religious material --

MS. WINER: Excuse me, Judge. I would object to summarizing the testimony.

THE COURT: I'm going to sustain that as well. It's in the nature of a summary; is also in the nature of leading.

Q. (BY MR. KAY): Did you have any religious material in your campaign materials?

A. Yes, we did.

Q. Was that the thrust of your campaign materials?

A. No, it was not.

Q. After your involvement with the Colorado Springs ordinance -- by the way, what happened to that Colorado Springs sexual orientation ordinance?

A. Well, eventually the city council voted it out

[v. 15, p. 728]

eight to one.

Q. What was your next involvement in the political arena as it relates to sexual orientation provisions or laws?

A. Well, as we began to look at what happened in Colorado, and we began to apply what we had thought and researched and discussed and considered, we saw that this was an issue in the entire state. There were a variety of ways it could be approached. But as we considered statutes, and we considered possibility of using the legislature, we felt like that the best way was to give the entire state an opportunity to vote on the issue and use the initiative process, and that's what we decided to do.

Q. What made you think it was a statewide issue?

A. Well, one of the main reasons was that the Governor had issued some directive regarding government agencies, the human relations or the civil rights commission was making it a state issue.

Q. How were they making it a state issue?

A. Well, they were implementing this through their whole civil rights commission structure. And thinking in terms of the nature of civil rights legislation, it's much broader than local areas. And so that when you go through the initiative process, you have to gain signatures, and then people everywhere in the state, qualified voters, have an opportunity to vote on it. And the other reason that we wanted to use the

[v. 15, p. 729]

initiative process instead of trying to go through the legislature, we were very aware of the fact of the very strong political influence that the homosexual proponents had. And it's much easier for them to influence a small group of legislators as opposed to having everyone have an opportunity to express their opinion on the issue. So that

probability was the most compelling interest that we had in going through the initiative process.

A. How did you come up with the language that eventually became known as Amendment 2?

Q. Well, we employed the use of attorneys that we discussed the basic issue that we wanted to address and that was protected class status for homosexual and bisexuals and lesbians, and we gave that to the attorneys, and they massaged it, they were all constitutional attorneys or eventually that were called into [sic] critique and to, you know, give their impression, because we knew at that time we would be going through the process that we are here today. And this, of course, is no surprise. So in order to be sure that we met the constitutional requirements, we had constitutional attorneys draw it up. We had constitutional attorneys around the country review it, and this language, I didn't read it all, but I'm sure that's it, was what we came up with. And when we submitted that to the Secretary of State, and the Attorney General, they -- I don't now how many appeals there were regarding

[v. 15, p. 730]

the wording, but as I recall there were four or five, but to my knowledge there was not one word changed in the way we originally submitted the proposed amendment.

Q. Now, you are talking about the petition process -- the referendum process that you went through to get Amendment 2 on the ballot?

A. Yes, that's correct. We had to get the wording approved before we could print the forms to get the signatures for the initiative. We had to -- that all had to be approved before we could start distributing them and getting signatures.

Q. Did you do that process yourself?

A. Well, I personally yes, I did -- well, you mean gathering signatures?

Q. The whole process, the language being drafted?

A. No.

Q. Submission to the Secretary of State, submission to the Attorney General, the hearings on the language, obtaining the petition signatures, did you do all that?

A. No. I was in attendance most of the time. A lot of that was done by the legal people and Kevin and Tony were directly involved more than I was in that, but I was present in many of the things that were talked about.

Q. Was the amendment language eventually approved to go on the ballot?

A. Yes, it was.

[v. 15, p. 731]

Q. What did you do then?

A. Then we went into the process of gaining signatures to get it qualified to be placed on the ballot in November of 1992.

Q. How did you do that?

A. Well, we used the traditional manner of just distributing the forms with people who are on your side in this issue. There's two ways to do it, and you can pay to have professional petition carriers getting signatures. We

didn't have any money. The other way is to get volunteers to carry the signatures, and these [sic] what we did. And I personally carried the petition.

Q. How many signatures did you eventually get?

A. Me personally?

Q. No, the organization.

A. Approximately 85,000. I would like to point out, though, that it the process I personally gained or secured over a thousand signatures. And I did this in all kinds of arenas, so to speak. I was in service clubs, in business, in church, in parades, one parade I attended, in shopping malls. My wife thought that the clipboard had become an appendage. And I talked with a lot of people. And this whole process really strengthened my resolve and understanding of how the majority of people in Colorado felt. And it wasn't a matter of hatred. It wasn't a matter of trying to deny civil rights to

[v. 15, p. 732]

homosexuals. They have the same civil rights as everybody else. Their whole premise of the people that I talked to was that they have equal rights, and they certainly don't deserve any special rights. And that's why they signed the petition.

Q. Is that what you intended Amendment 2 to do?

A. Well, what we intended Amendment 2 to do was to deny protected class status to homosexuals. And in the process, that does not give any protected class status to heterosexuals.

Q. Why not?

A. Our argument consistently was throughout the campaign that how you have sex for whatever reason is not an appropriate criteria for civil rights.

Q. After you obtained enough signatures to get this amendment on the ballot for November of 1992, did you conduct a political campaign to support this amendment?

A. Yes, we did.

Q. CFV did that?

A. Colorado for Family Values did that, yes.

Q. And how did you do that?

A. Well, we used a lot of the traditional manners of conducting a political campaign. We didn't have the money to do some of the things that should be done in a campaign. We didn't have the money to conduct polls. We thought that we had done a considerable amount of polling and just gathering the

[v. 15, p. 733]

signatures, so we had to rely on that. We set up groups of people in the communities all over the state to support our campaign. We used I think pretty much the traditional manners of conducting a political campaign where we could afford it.

Q. Did you have any experience in conducting political campaigns prior to this?

A. I have been involved in the political campaigns not never as a candidate, but I have been campaign manager for a couple of -- for city council candidate, for -- and then he later on went on to be a state representative as a candidate.

And I've been involved in other actions as a business person in the last 45 years in Colorado Springs.

Q. Did CFV produce any written material in support of its political campaign to promote Amendment 2?

A. Yes, we did. One other thing, I am a precinct committee member.

Q. Let's look --

MR. KAY: Before we move on, Your Honor, I would move admission of Defendant's Exhibit Y, the proposed city of Colorado Springs sexual orientation ordinance.

MS. WINER: Your Honor, I don't think any foundation has been laid for it. I think that Mr. Perkins has stated for the record that he doesn't know what draft this is or whether it is or isn't what the State has said it is. So that would be the basis of my objection.

[v. 15, p. 734]

THE COURT: Anything further, Mr. Kay?

MR. KAY: I think he's identified it, and that that was -- he was involved in that process at the city level.

THE COURT: The objection is overruled. Mr. Perkins hasn't indicated that this is the final draft which was approved, but he has indicated it was one of those, and it's offered for an indication of how he got started in the process, and it will be received for that purpose.

Q. (BY MR. KAY): Mr. Perkins, if you'll turn to tab 8 which is Exhibit W, do you recognize those documents?

A. Yes, I do.

Q. What are those documents?

A. This tabloid -- let me see. Is it all just one document?

Q. It's a lengthy document with a couple of shorter ones in the back.

A. This is the copy of the tabloid that we distributed toward the end of the campaign.

Q. When you say tabloid, you mean the original of this looked like a little newspaper?

A. That's correct.

Q. And it's been copied in individual little sections?

A. That's correct.

Q. So the original if he had it would open up

[v. 15, p. 735]

like a newspaper or tabloid?

A. That's correct.

Q. What's at the back of that, behind the tabloid?

A. This was a handout that we have used. These two are brochures that we used during the campaign.

The CFV report is a monthly letter that we mailed out to our data base, and that we used this after the campaign, this started after the campaign.

Q. Are all those documents that are produced by Colorado for Family Values and other than the last CFV report were prepared during the campaign?

A. That's correct.

MR. KAY: Your Honor, we would move for admission of Exhibit W.

MS. WINER: We have no objection, Judge.

THE COURT: W is admitted.

Q. (BY MR. KAY): How many copies of this campaign material did you produce and distribute throughout the State of Colorado?

A. The tabloid we printed 800,000. I really don't know exactly how many of the handouts we printed but a large number.

Q. Did you distribute all those throughout the state of Colorado during the campaign?

A. The tabloid which was distributed toward the end

[v. 15, p. 736]

of the campaign, we estimate that we did not have the money to mail it, so we delivered them by hand, and we estimate that we delivered approximately 750,000. The handouts were used -- given to our supporters and they distributed those.

Q. Did Colorado for Family Values do any other campaigning in support of Amendment 2 other than publish this material and distribute it?

A. Yes, we did. And I guess it was at that time that I was really introduced to the tremendous political influence that the homosexual proponents have in Colorado. And not only Colorado, but over the country.

Q. How was that?

A. Well, bear in mind now I have been in business and our company has been in business in Colorado Springs since 1945. And I started doing television commercials in the early 50's. I just want to give you an example. There are three television stations that cover the Colorado Springs market, excluding the cable. Two of those stations, and I have been a substantial advertiser on all of those stations over the years, two of those stations, the news departments were so biased on this, it was absolutely amazing to me, and I said, hey, guys, I'm a customer, remember? This is old Will. I come in here and I give you several thousand dollars a month. Lighten up a little. But that didn't help a bit.

Q. When you say they are biased, what do you mean?

[v. 15, p. 737]

A. I mean in the way they approached this situation. They absolutely took our opponent's position, and we had to dig out of a hole every time I talked to them. Let me just give you an example that happened one morning. I was in Grand Junction, and I have been called by a radio station in San Antonio, WOAI wanted an interview, so I made arrangements and I called them from the airport in Grand Junction and they said, Mr. Perkins, we are going to put you on hold for a moment, until the host comes on, and I listened to the host give the whole misconception of Amendment 2 and just bury me before I'm even introduced on the program.

Q. What was the misconception.

A. That's the kind of thing that I experienced all the time.

Q. What is this misconception in the meaning?

A. Well, the misconception, for instance, he describes it as Amendment 2, the amendment that denies homosexuals civil rights in Colorado. That's nonsense.

Q. Why is that a misconception?

A. Because we do not deny civil rights for homosexuals in Colorado. They have the same civil rights as everybody else.

Q. What else have you experienced?

A. Well, I came to Denver to place the television spots –

[v. 15, p. 738]

Q. We are talking about the campaign?

A. I'm talking about the campaign. And we had two aspects to our campaign. Civil rights and the behavior aspect. Now bear in mind I had no problem with the spots except in the Denver market. In one of the stations in Colorado Springs, we – where we had the problem was with the behavior spots, and let me go into that in detail. We didn't have money to do the traditional television campaigns, so we used ten second spots, announcements. In this ten seconds – in these ten second spots there was footage of gay pride parades. We didn't stage the spots. We didn't produce them. They were public parades in San Francisco.

The first time I saw the footage, I said I don't think this could happen in America. We have to make absolutely sure that this is correct, that we are not using trick photography, what have you. So we call the San Francisco police department and described what we had, and they said, yes, that's the way it is. And we said, Well, Don't you have any laws against obscenity and indecent exposure and that sort of thing, and they said, oh, yes, we do, and they said but our main job is to keep the peace, and if those people didn't get what they want they get really nasty. And then besides that, nobody wanted to lose their job. And I said, what do you mean by that? And he said, well, the Mayor's in the parade.

Now, the Mayor is now a United States senator.

[v. 15, p. 739]

But the situation is this: Even though they had the laws in place in San Francisco where this particular group has so much influence, they overlook the laws. And they disregard them in order to accommodate what they are doing. So we felt, knowing full well never saying that all homosexuals parade like this, but this is an aspect of what Colorado was being asked to embrace and to give protected class status to, and we felt that this was an aspect of this whole issue that the citizens of Colorado had a right to know about, and it was part of their decision making process.

So in the ten second spots which we heavily censored and which we required that they run after 10:00 p.m. at night, we – I came up. I already purchased the time in Denver, the channels, if I remember the channels, I think there was 2, 4, 9 and I think 12 bought the time. No problem. Later on submitted the footage, submitted the actual spots. And they all in Denver said, no, we won't run these. It's not appropriate for our station. So I went to the cable stations and I got the same answer. What had happened is that we had been effectively censored from running these spots. And bear in mind they ran everyplace

else in the state, no problems, but only in Denver did they say this is not acceptable.

After the election, NBC aired an hour-long special, hosted by Maria Shriver, Prime Time in Denver, carrying uncensored footage of the same parade, the same footage we tried

[v. 15, p. 740]

to get censored, heavily censored, to run them after 10:00 o'clock at night, and it was absolutely appropriate at that time. That's the kind of bias that we experienced, and the reason I say this represents influence. When you are running a political campaign, if the media is on your side, normally you are the winner. That's why they were surprised -- so surprised when we were victorious. They were flabbergasted.

Q. Let's talk about who supported and who opposed this Amendment during the campaign. In the state of Colorado, what elected officials came out against Amendment 2?

A. Senator Campbell was out spoken [sic] on the issue. I'm trying to think of the -- there were ads in one of the political papers that is distributed before the state convention, I forget what the name of the paper is, but I remember there were other politicians opposed to us but the one that made the biggest impression on me was Campbell. What made an even bigger impression on me was the fact that the central committee of the democratic party came out strongly in opposition of Amendment 2. The Republican party did not make any statements about it. To my knowledge, there was no candidates making a strong public position about Amendment 2 that was brought to my attention.

Q. Other than now Senator Campbell, any other candidates that were running for election in November that came out against Amendment 2?

[v. 15, p. 741]

A. I can't specifically identify them by name, because I don't remember. There were some, but I don't know. I can't think of their names at this time.

Q. How about officials that were not running for election, but already elected officials? Any of those come out in opposition to Amendment 2?

A. Well, if you call Governor Romer a politician, you would have to say that he was the honorary chairman of EPOC, which is our opposing organization. Patricia Shroeder, Representative Schroeder was another honorary chair person [sic]. The Mayor Webb was in opposition to Amendment 2. To my knowledge, the only newspaper editorial staff that took our position was the Gazette Telegraph in Colorado Springs and the Tribune in Greeley. Now, there may have been others but I'm not aware of them.

Q. So two newspapers that you know of supported Amendment 2?

A. Yes.

Q. How many newspapers in Colorado came out in direct opposition to Amendment 2?

A. How many are there?

Q. All the rest came in direct opposition?

A. Yes, to my knowledge.

Q. The Denver Post? The Rocky Mountain News?

A. Rocky Mountain News, yes.

[v. 15, p. 742]

Q. Grand Junction Central?

A. Yes. Pueblo.

Q. Pueblo?

A. Chiefton.

Q. Did any --

A. Does that give you some idea of what media influence means?

Q. -- did any elected officials in the State of Colorado, state, city, or county, come out in support of Amendment 2?

A. They may have in private. But after the election, there were comments made both ways by some, but during the elections and during the campaign, I do not recall that kind of support from the Chamber of Commerce. They were very politically motivated, and most of the comments that came were in opposition to Amendment 2, especially after the election. I don't -- this was a movement of the people, not the politicians. They didn't touch it.

Q. Did the Colorado Civil Rights Commission take a position on Amendment 2?

A. Yes, they did.

Q. What was their position?

A. Their position was in opposition to it and that always confused me. The people that the civil rights commission purports to represent are the people covered under

[v. 15, p. 743]

the Civil Rights Act. And here's a piece of legislation that could seriously affect civil rights in this nation and this state, and former chairman of the civil rights commission, Mr. Ignacio Rodriguez, Mr. John Franklin from Mark Probe, those three former chairmen of the commission were very much in favor of Amendment 2. Men who had devoted their lives to this. And so men whose counsel we sought during this campaign and publicly took our position, who I consider experts on this issue, were 100 percent behind Amendment 2. And yet the commission under the direction of Jacqueline Marquez and Rabbi Steven Foster took an opposite view. And it was interesting to me that they would be promoting an issue that would be detrimental to the people they represent.

Q. How would it be detrimental?

A. Because it will dilute the whole meaning of civil rights and dilute the resources that are available to be used, And Jacqueline Marquez commented in the report I heard during the campaign about the fact that they were under-staffed and didn't have the personnel and so forth to meet all of the needs of the commission, and Mr. Duran who was also one of the civil employees of the civil rights commission stated in some of the material that we used of his that it would dilute the resources available to the implementation of the civil rights by the commission.

Q. During the campaign, did CFV take a position on

[v. 15, p. 744]

whether Amendment 2 would affect people's rights under what in Colorado is known as the Smoker's Bill of rights?

A. During the campaign we were constantly being barraged by the fact that the homosexuals didn't have any recourse if they were fired simply because they were a homosexual. The Smoker's act which was -- I don't think it says anything about smokers -- in fact, I know it doesn't, but it was commonly referred to as the Smoker's Act because it was promoted by the tobacco industry, and in 1990, it was becoming popular to ban smoking on the job to some businesses and so forth, and they were concerned that it would be possible for an employer to discharge a person who wasn't actually smoking on the job but he knew they smoked in their private life. So the idea basically says, as my understanding of the Smoker's bill, is that it's illegal to discharge someone who is engaged in a legal activity off the job. It's illegal to fire them for that reason from the job. So we thought about this, and saying, well, now if homosexuals are just wholesaling being discharged because -- only because they are homosexuals, this would be a perfect resource for them. Sodomy is legal in Colorado. They are claiming that being homosexuals and engaging in a legal activity off the job and because somebody fired them but they are homosexual that would be a perfect resource. And keeping in mind that the Smoker's Bill went in in 1990. Well, during our campaign nobody had used it that way. Later on, I guess

[v. 15, p. 745]

now there is an attorney here in Denver who used that and was awarded a $91,000 judgment for it.

Q. Why did he claim he was fired, if you know?

A. As I understand it, he claim he was fired because he was homosexual.

MS. WINER: Your Honor, I would object. That's objectionable.

THE COURT: It's hearsay unless you are offering the case for the Court to take judicial notice.

MR. KAY: I would offer the case. It was a Denver District Court case and an attorney here in the City and County of Denver sued his employer for being terminated.

MS. WINER: Your Honor, I would object to --

THE COURT: If you tell me what the case name is and the case number, the Court is able to take judicial notice of its own files.

MR. KAY: It's Borquez versus Ozer & Mullen. The plaintiffs listed Mr. Borquez as a witness throughout this entire trial.

MS. WINER: Your Honor, I have no objection to the Court taking judicial notice of the case.

THE COURT: Thank you.

Q. (BY MR. KAY): Mr. Perkins, did you use the term special rights in the Amendment 2 language?

A. No, we did not. And --

[v. 15, p. 746]

Q. And why not?

A. Well, as we were getting a consultation from attorneys around the country, one of the attorneys that we were consulting with was a man by the name of Bruce

McCormick, and Mr. McCormick, as he reviewed this language, sent us a letter in which he gave us the advice that -- and in essence was saying that special rights it not a legal term and should not be used in the wording of the amendment itself but it would be a good campaign slogan.

Q. Did you use it as a campaign slogan?

A. As we thought through our whole campaign, this was really the thrust of our campaign, that protected class status was a special right. Homosexual proponents wanted that special right, and we said that's not appropriate. They have equal rights but not special rights. And that was basically the thrust of our campaign.

Q. What happened? Obviously, Amendment 2 passed in November. What has happened since the passage? What has Colorado for Family Values done since the passage of the Amendment in November of 1992?

A. We have been involved in several things. Shortly after it -- as you know, shortly after the election, the suit was filed which we are in process here now. The homosexual proponents initiated a boycott of the state. There had been a boycott on my business throughout the campaign. So

[v. 15, p. 747]

one of the things that I have done as I have been interviewed by radio stations and some television stations around the country is to do whatever I could to dispel the basis of this boycott. We have been acting as a resource for other states which are involved in the same issue who see the threat the same way we do. We have prepared information for them that would have been extremely useful to us if we had had them as we went through our campaign. We have been involved in informing our supporters with a monthly newsletter, and it's -- we feel a responsibility to the majority

voters of Colorado to continue to represent Amendment 2 on this -- here in the state of Colorado.

Q. You mentioned an organization by the name of EPOC?

A. Yes.

Q. That you said was your opposition. What was EPOC?

A. Well, let's see. It's equal opportunities and I forget what it stood for, and I told them if you want equal opportunities, you already got that, so come on over to our side, but they didn't see it that way. But they were our counter part [sic].

Q. Do you know -- first of all, how much money did Colorado for Family Values raise and spend during the election?

A. Well, approximately $375,000. This was all a

[v. 15, p. 748]

matter of record. I don't have an exact amount but approximately that.

Q. Do you know how much EPOC raised and spent?

A. Their reports indicated approximately twice that much.

Q. So almost $800,000?

A. It didn't include all the free media they got but that's what they spent.

Q. During the campaign, what position did EPOC take on Amendment 2? What was their campaign slogan?

A. Well, basically, they said we don't want protected class status. We don't want affirmative action. We just want equal rights. And they talked about the protection in jobs, housing, and public accommodations. And one debate that I had with attorney Pat Steadman at the Brown Palace Hotel for the City Club of Denver, he said that's all we want --

MS. WINER: Your Honor I'm going to object to the hearsay.

THE COURT: The last question was what was their policy or what was their approach against the amendment, and all I'm hearing as this is being representative of the arguments or the approach that EPOC took, not as hearsay. I'm hearing it representative of the opposition.

Mr. Perkins, you may complete your answer.

THE WITNESS: Thank you, Your Honor.

[v. 15, p. 749]

Mr. Steadman, who was a spokesman for EPOC and I had appeared with him on other occasions, made the point that all they were interested in was protection in jobs, housing, and public accommodations. And when it came my time, I suppose there were 150 people or so in the audience, I asked him I said how many of you have ever spent a night in a hotel or motel with someone of the same sex? Either on a convention or vacation or what have you. Nearly everybody raised their hand. I said how many times when you registered at the counter did the clerk ask you if you were homosexual. And nobody raised their hand. I said how

many times when you rented a house or an apartment or bought a house or whatever did anybody ever ask you if you were homosexual? And nobody raised their hand. And I said how many of you when you applied for a job did anybody ask you if you were homosexual? And nobody raised their hand. I said how many of you employers out there know how many homosexuals you have working for you? And nobody raised their hand. I said how many of you care? And nobody raised their hand. I said in any of those instances, you could make it happen. You could make that become the central issue, but you would have to make it that. And then I sat down and Mr. Steadman stood up and he said okay, he said, I admit it, it hardly ever happens, but if it does there ought to be a law against it. And the people laughed. They understand that if you have a law for every conceivable thing that can happen, you

[v. 15, p. 750]

can restrict society to a point where it really can't function. Somebody said that more definitively, the less you have.

MS. WINER: Your Honor I have to object to this hearsay. I think it goes way beyond the question that was asked as far as what is the position of EPOC.

THE COURT: Yes, the answer has strayed beyond the limits of the question. I think we will take the noon recess and we will return at 1:30.

(A recess was taken.)

AFTERNOON SESSION, FRIDAY,
OCTOBER 15, 1993

(The following proceedings were had and entered of record:)

THE COURT: Mr. Perkins, you can resume the stand.

THE WITNESS: Thank you.

THE COURT: Thank you. Mr. Kay, you're in direct. You may continue.

MR. KAY: Thank you.

FURTHER DIRECT EXAMINATION

BY MR. KAY:

Q. Mr. Perkins, a lot has been said about what Amendment 2 does to homosexuals, lesbians and bisexuals. Would you tell the Court what you feel Amendment 2 does for the citizens of the state of Colorado.

[v. 15, p. 751]

A. In terms of the effect on the homosexuals, at no time have we ever promoted mistreatment of homosexuals, and as I said earlier, if someone is doing that, if they're maligning them, threatening them, whatever, somebody's breaking the law. The laws are in place to protect that, and they should be administered.

As far as the effect on the rest of the state, our objective was to deny protected class status to the homosexual, bisexual and lesbians, who were the only ones who were seeking that on sexual orientation.

We also said that sexual orientation is not an appropriate criteria for civil rights, and that includes heterosexuals.

We think that the crux of the matter and the reason we think it's such a pivotal, important, compelling reason for Amendment 2 is the fact that under Amendment 2,

homosexual proponents can advocate any kind of a program they want to in Colorado, but they have to do that as a special interest group and not as a protected class, and we think that has very important ramifications.

Take the school situation, for example. If homosexual proponents go in and approach the administration and say, we think homosexuality should be taught as being normal, healthy, just another way of doing things, it should be taught by homosexuals, if necessary we should be able to lead students

[v. 15, p. 752]

through this activity to help them make a choice and identify where they're going sexually -- now, if the parents hear about this and they object to that and homosexuals are a protected class, then they have a -- you know, being a protected class isn't saying they can break the law, but those gray areas makes it much more difficult to win an argument in a setting like that if you're dealing with a protected class situation. We want the playing field to be level, and we want parents to be able to express their opinion.

And let me give you just an example. I was talking with the superintendent of one of the large school districts in Colorado Springs, and I said, "Doctor, what will you do when a group of parents come to you and say, "We represent straight children and homosexual children. We're very concerned about the locker room and the shower room and the toilet facilities here at the school. Now, we think that there should be a facility for straight boys, there should be a facility for homosexual boys, there should be a facility for homosexual girls and for straight girls, and we know that since sex takes place in the bathroom in some instances" -- and there's plenty of documentation to that, "'we feel like there should be supervision in the homosexual bathrooms.'"

Now, his remark was --

MS. WINER: Your Honor, I'd have to object to this hearsay.

[v. 15, p. 753]

THE COURT: The response f the school superintendent would be in the nature of hearsay. It's sustained.

Q. (BY MR. KAY) can you tell the Court what your feelings are about this issue without --

A. Yes, I can.

Q. -- giving them what the school administrator may have said to you?

A. The objective of the homosexual proponent is to blend the gender issue to where it is not a matter of discussion, it's not an important thing. In the case I described, one solution would be to just have one bathroom so you wouldn't have discrimination for anybody, and I think this is one of the important reasons that homosexuality does not have protected class status, because this issue will be debated as this progresses, and that's why I consider it to be extremely important.

Q. Did you intend Amendment 2 to discriminate against homosexuals, lesbians and bisexuals?

A. Our intention of Amendment 2 was to deny them protected class status. It was not a matter of discrimination.

Q. Do you hold any ill will toward homosexuals, lesbians, bisexuals, gay men personally?

A. I'm going to have to say that my experience with this whole thing has made me more compassionate to homosexuals,

[v. 15, p. 754]

and I say that in the light of the fact that, as I've studied the issue for the last months, almost two years, I poured a lot of my life into it. I say that and I am more than ever convinced that the importance of Amendment 2 is extremely pivotal for this state and for this nation even though I'm very compassionate to the situation with the homosexuals.

Q. Have you experienced any problems in your personal life as a result of your being involved in the Amendment 2 campaign?

A. This is a very emotional issue. I guess that's one thing everybody would agree on, and some people are prone to express their opinions in various ways. My personal business has had a boycott on it for several months prior to the state. I get -- people bring me copies of things that appear on fax machines in Colorado Springs referring to me, but I understand that. I understand that it's emotional. It's important to everybody regardless of what side you come from, and I don't make a big deal out of that.

MR. KAY: That's all I have, Your Honor.

* * * * *

(CROSS EXAMINATION)

* * * * *

[v. 15, p. 770]

Q. Sir, excuse me again. I've asked you whether you know of any cities or states or municipalities that actually have any quotas for gays and lesbians.

A. Any ordinance that establishes homosexuals as a -- or sexual orientation as a protected class --

Q. Mr. Perkins?

A. -- affirmative action is a logical progression.

* * * * *

[v. 15, p. 771]

Q. I'll start from the question before that, then. In the Amendment 2 text right there, you also refer to quota preferences; isn't that correct?

A. That's correct.

Q. Although you don't know of any cities or states or municipalities that actually have any quotas for gays and lesbians, do you?

A. I said that any ordinance that has protected class status, affirmative action is a logical progression of that.

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[v. 15, p. 786]

(REDIRECT EXAMINATION)

Q. Mr. Perkins, how did Amendment 2 fare with the religions in the state of Colorado? How many supported and how many opposed Amendment 2, if you know?

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THE WITNESS: Thank you.

I thought as I looked at this that we would get broad support from pastors. We called one meeting. We sent out letters to 400 pastors in Colorado Springs asking them to come to a meeting where we could explain this, and we had two associates show up for that meeting. I tell people that I know how General Custer felt the morning he modeled that first arrow

[v. 15, p. 787]

shirt. That was my first big surprise.

During the campaign we -- the outspoken people on this issue for the most part were -- who were people of the cloth were on the other side of this issue. I vividly remember one of the captions from -- I think it was the Rocky Mountain News that said, "300 Denver Area Pastors Blast Amendment 2."

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TESTIMONY OF TONY MARCO

[v. 15, p. 821]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

I'll ask that in your testimony you speak directly to the flat side of the microphone. It will assist everyone in hearing

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Good afternoon, Mr. Marco.

A. Good afternoon.

Q. Please state your name.

A. My name is Anthony Nicholas Marco.

* * * * *

[v. 15, p. 828]

Q. Mr. Marco, could you describe for us now the events that led up to the issue that we are in court today, and that is the Amendment 2 initiative process. Are you familiar with an organization called Colorado for Family Values?

[v. 15, p. 829]

A. Yes, I'm familiar with it.

Q. What is that organization?

A. Well, it's an organization whose goal was very simple and direct through the initiative process to put into place an amendment which would say that homosexual, bisexual, and lesbian orientation was not to be granted protected class status, and all that comes attendant with that status in the state of Colorado.

Q. How did you personally first get involved with this issue of sexual orientation?

A. Well, that's an interesting question. It dates back to February 6th, 1991. On that date, I had no idea that Boulder, Denver, and Aspen, had ordinances granting protective class status to gays. A friend of mine called me up and said that a bill was to be considered the next day by the House Judiciary Committee up here in Denver, HB-1059 to be exact, and that this bill would first of all grant for the first time legal recognition to sexual orientation equivalent to that of ethic [sic] groups. In fact, the bill was entitled Ethnic Intimidation Bill. It was authored by Wilma Webb who is the wife of Mayor Wellington Webb, and it said that -- this added to substantially a previous ethic [sic] intimidation bill sexual orientation and added penalties equivalent to felonies for any group that would -- might simply make remarks that would make someone feel uncomfortable because of their sexual

[v. 15, p. 830]

orientation.

Now, what this represented to me was aggression against the fundamental rights to free speech, free association, and potentially free exercise of religious believes [sic] of all Colorado citizens, since this was a bill with state-wide import, and furthermore, to me, immediately when I heard this, I said this is preposterous, the equation of sexual orientation with ethnicity to me that represented the colossal nonsequitur. And my friend said simply someone needs to go up there and testify genes [sic] this will [sic].

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[v. 15, p. 831]

Q. How do you believe that HB-1059 equated ethnicity and behavior?

A. Well, quite, simply by extending the same protections as it says from harassment, that were enjoyed by handicapped people, the aged, a number of other categories, and recognized ethnic groups or protected classes extending those same protections to gays as an entire class.

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[v. 15, p. 833]

Q. You used the term "protected class status." Could you describe what you mean by that?

A. Well, I think that the Attorney General of the

[v. 15, p. 834]

state of Colorado in their analysis and ballot initiatives defined the term quite well. It refers to the awarding of a particular recognition under law of a group who has been chosen for protection from discrimination and chosen to be given the ability to claim discrimination, you know, under civil rights laws.

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[v. 15, p. 836]

Q. And can you describe the founding of Colorado for Family Values for me, please.

A. First of all, there might be a couple of other

[v. 15, p. 837]

items, but that we need to mention that demonstrated what I considered to be statewide aggression by gay militants and supporters as the fundamental rights of Colorado citizens. These two instances of statewide activity were in the -- well, three, brought by Governor Romer's executive order were not the only impetus that precipitated Amendment 2. In

addition, we found as a result of Governor Romer's executive order pressure being exerted by the gay militants on the student affairs departments of universities and the University of Colorado is to make it mandatory follow all clubs whatever their nature on campus to either accept devout gays in membership or to lose all privileges. This is one example of this. We have from an article in which Robin Miller who is the author of the Colorado Springs ordinance something to the effect that there was a broad statewide agenda of the militant gay movement which in fact Amendment 2 pretty much put on hold because of the necessity to very actively oppose passage of the amendment. But all of these questions came to bear and came to the point around, oh, February 15th to February 21st or so, when I began thinking about the possibility of finding a way to put a stop to this kind of aggression with one single act.

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[v. 15, p. 839]

Q. Why did you come to the believe [sic] that a statewide measure was appropriate and necessary?

A. It was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease. Secondly the legislature is very vulnerable to all kinds of lobbying and other activity without citizens' direct representation on that activity. Lobbying for which I discovered gay militants were very very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through passage of constitutional amendment. And since the citizens have the right to enact constitutional amendment through citizen initiative process, this seemed the logic [sic] way to accomplish that purpose.

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[v. 15, p. 842]

Q. Now, on the easel behind you is a copy of the text of Amendment 2. Can you explain to us how or why the language was chosen that you selected to use within the text of the initiative?

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THE WITNESS: Okay. The fundamental principal behind the drafting of the initiative language was quite simply to take those factors which we felt that gay militants had

[v. 15, p. 843]

themselves said that they desired, plus all of the factors that are attendant on achievement of or awarding of protective class status and simply say no to those.

Q. Why did you use the terms homosexual, lesbian, or bisexual orientation conduct, practices, or relationship? Why did you select that phrase?

A. Actually, I didn't select that phrase. That was selected and reviewed by the constitutional attorneys involved.

Q. What was CFV's intent in using that language?

A. The intent of using that language was quite simply to forbid the awarding of protected class status and other attendant benefits thereof at that point. And that was, I would say, the sole intent of this. Now, I'm not in a position to question what the -- you know, what these constitution attorneys wrote and reviewed, but I can say that the protected status terminology came from the second draft of the Colorado Springs Human Rights Ordinance, and that,

of course, was written at least in part by Robin Miller who was a devout lesbian attorney.

Q. How about the phrase minority status?

A. We took that from Denver. I don't know whether it's called Human Rights Ordinance or whatever. I have that ordinance also. And also some material relating to it in some the term minorities is used referring to all those protected under that ordinance.

[v. 15, p. 844]

Q. How about the phrase quota preferences?

A. Well, in the Boulder ordinance, I have found a phrase that according to former Colorado Civil Rights Commission chairman John Franklin, former Colorado Civil Rights Attorney Earl Rodriguez, and director of Regional Offices for Colorado Civil Rights Division Tom Duran allowed for, did not call for but allowed for affirmative action for all classes protected under the ordinance, which would have included sexual orientation; thus implying possible affirmative action benefits.

The second draft of the Colorado Springs Human Rights Ordinance also called for a review of the city's affirmative action policies. Presumably in my thinking it allowed for the inclusion of the new classes that now would have been protected by that ordinance which included sexual orientation. There were a number of other ordinances from other places in the country protecting sexual orientation and reports that I had that indicated that affirmative action was being sought by gay and lesbian relatives in the book after the book was written by--

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[v. 15, p. 845]

Q. (BY MR. TYMKOVICH): Mr. Marco, what about the phrase claim of discrimination? How was that derived?

A. From my understanding, only groups of joint protected status can make claims of discrimination under civil rights law, so it was absolutely necessary to include that phrase to round off the entire concept of forbidding protected class status of sexual orientation.

Q. How did you intend to affect the rights of gay people through the use of that language.

A. Quite simply to simply say that gays would not be recognized as a protected class and therefore not have claims of discrimination. The two go inextricably together. There is no such thing as a group that enjoys claims of discrimination which is not regarded legally as a protected class.

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[v. 15, p. 846]

Q. I didn't ask you the people you intended the Amendment 2 to apply to and by its terms it applies to the state of Colorado and various entities. What was the intention of CFV in drafting that language?

A. The primary intention was to resist statewide aggression on the part of gay militants against the fundamental rights of Colorado citizens.

Q. So it applied to governmental entities?

A. Yes, governmental entities. And in addition, our thinking was that civil rights protections of this sort are a matter of statewide concern. My opinion, the application of specific civil rights protections from town to town is a retrograde principal. I thought the whole issue was settled back in 1964. The Civil Rights Act of '64, which in a sense overruled the ability of local jurisdictions to decide whether or not they were going to protect certain specific classes. Obviously, if it comes extremely inefficient, let's say they have separate water fountains for let's say African American people in one town and not have them in another and to conduct business in that way this was also an attempt to consolidate the State's policy with regard to this issue.

[v. 15, p. 847]

Q. By its language, it's intended to apply to political subdivisions, municipalities and school districts?

A. That's correct.

Q. How comprehensive did you intend Amendment 2 to be?

A. General statewide import, covering the disposition of this issue whenever it occurred. I did realize that this would nullify enforcement of Boulder, Denver, and Aspen's gay rights ordinances, but that effect was in fact only incidental to the larger purpose of the amendment.

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[v. 15, p. 850]

Q. What was the intent of the effect of Amendment 2 on the private sector or private individuals?

A. It had no intended effect on private sector business or employment policies within private corporations, you know, there's no intended effect in that regard. This is simply an amendment to limit government from extending the protected status to this kind of sexual orientation.

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[v. 15, p. 852]

Q. What was the purpose that CFV had a concern about the local ordinances?

A. Again, my concern is that this represents a retrograde principal in civil rights. I don't think these kinds of issues are a matter of local certain [sic]. Also, my

[v. 15, p. 853]

analysis of the strategy of the gay militant movement is that gay militancy prefers to begin an attempt to gain larger scale protections by first getting passage of smaller -- of ordinances on smaller scale in towns and cities around the state and then using these as leverage to then approach state legislators with concepts of a larger scale, larger scale measures.

Q. And?

A. And so by dealing with all of this in essence in one full swoop, we simply closed the lid on the entire issue here in the state of Colorado.

Q. Was Amendment 2 intended to take away all of the legal rights of gay, lesbian and bisexual individuals in Colorado?

A. No. And of course, I don't believe for a moment that it has that effect.

Q. What sorts of rights or legal protections did you believe existed after Amendment 2 had passed and were implemented?

A. Well, the right to petition, the right to vote, the right to lobby politically, the right to conduct business, the right to freely associate, every right that has been recognized as fundamental to every U.S. citizen. The only privileges I would say denied to gay, lesbian, bisexual citizens under Amendment 2 are attendant on the right to secure and make

[v. 15, p. 854]

use of protected class status.

Q. What about any laws relating to employment?

A. I don't see that amendment 2 has any effect on laws such as, for example, the so-called Smoker's Bill which in fact doesn't mention smokers but simply grant protection to any citizen from being dismissed for any legal off-the-job activity. So I don't think it affects these kinds of laws that may be on the books nor does it affect private corporations who may desire to extend employment practice protections within the organization to gay people.

Q. Now, you've testified that you proposed special rights for gay individuals on civil rights grounds and you prepared written materials to reflect yours and the organization's thinking on that. What was the nature of your analysis, and why you didn't believe this group should be eligible for protected class status?

A. Again, in essence, I moved away from using the term special rights because it legally has not meaning from what I understand. But in terms of protected class status, I you understand that the U.S. Supreme Court through a number of decisions has delineated certain criteria which offer boundaries to groups that are to be recognized a

suspect classes. These criteria involve, one, the demonstration that the entire class has mean income that is below the average, as a result of societal pressure or harm inflicted on that group for utterly

[v. 15, p. 855]

irrational bases. And also under that category would come measurable cultural and educational deprivation or disadvantage. The second criteria states that the group must demonstrate obvious immutable characteristics which clearly define it is a class. And the entire class must do so. And third criterion is that the group must be demonstrably politically powerless, and therefore in need of government support, in order to advance its interests and to bring such a group to a par in American society.

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[v. 15, p. 861]

Q. What were some of the consequences of the problems you saw if gay individuals did seek protected class status that you and your organization objected to?

A. I think my fundamental objection is that sexual orientation affords no rational basis whatsoever on which to define or identify the class of people seeking the protections. And as far as I'm concerned, this opens the door to an enormous amount of potential civil rights fraud. Secondly, the inclusion of sexual orientation under whatever definition to the realm of protected classes in fact represents a threat to the entire structure of civil rights as we know it for the very simple reason that if we suddenly allow sexual

[v. 15, p. 862]

orientation protected class status, we have effectively made nearly a hundred percent, I would suppose, if one says that virgins have no sexual orientation, at least nine [sic] percent of American society suddenly becomes a protected minority.

That's a fundamental observant in my opinion. These protections were given to groups who could demonstrate that such protections were needed to grant sexual orientation protected class status would mean the rendering of entire civil rights protections as we have always known them and represent classic non-sequitur in an utterly irrational principal.

Q. What concerns did you have about the effect of sexual orientation provisions on the business community?

A. I think possibly Mr. Perkins could speak to that better than I could. I don't know whether it's permissible for me to present a couple of operative scenarios, but in essence, granting these protections allows an immediate factor of intimidation to enter into the employment practice or the practice of hiring in businesses. And for example, person might come in under ordinance granting protected class status through sexual orientation to apply for a job along side an African American person and a woman, let's say, and say, well, I notice you have a number of African American people working here, you have a number of women, how many homosexuals do you have? Can you imagine this person who's a Caucasian male and who says I am a homosexual and I want this job, you have an

[v. 15, p. 863]

immediate potential threat of a lawsuit if the employment is denied and possible grievance complaints on behalf of the other two recognized protected classes who were denied that job. In that case, the plaintiffs' definition of sexual orientation offer no grounds whatsoever for proof of one's identity in terms of sexual orientation. So the potential for fraud in cases like that is enormous.

* * * * *

Q. (BY MR. TYMKOVICH): What were CFV's concerns with respect to private organizations, if any?

A. In essence, what we saw here was a denial of the right of free association without a rational basis. And under certain circumstances on behalf of recognized protected classes, the category right of free association is suspended temporarily so that those classes would not be shut out. Now, in this case the denial or the right to free association was without a rational basis in my opinion.

Q. And what was CFV's concern about the effect of sexual orientation provisions on religious organizations or

[v. 15, p. 864]

churches?

A. Well, in essence, this granting protected class status of sexual orientation threatened the total demolition of various religious denominations, and others who did not or whose moral beliefs were not in accord with the gay lifestyle or the militant gay political agenda.

Q. Excuse me, didn't the ordinances typically have a religious exception?

A. These religious exemptions are deeply flawed and extremely weak in a number of regards. Most of the ordinances I have read simply say that the religious organization does not have to hire someone who is not of their denomination. That offers no protection whatsoever because on thing anyone can undergo the membership training classes, whatever a church might require, and then afterwards in therefore becoming a member of their denomination and afterwards say I am a homosexual and I wish to seek employment or something or another. Secondly, these exemptions do not cover what are known as parish church organizations at all since most of these

organizations are not denominate in nature and therefore no protection is offered whatsoever. Third, these kinds of protections would put the church at an instant disadvantage in the public eye because gay militants do say that churches are the only organizations allowed to, quote, discriminate against gays without have to suffer recriminations. And fourth, a sort of panoply, if you

[v. 15, p. 865]

will, hangs over all 58 of the organizations in the form of the U.S. Supreme Court precedent Bob Jones University versus Simon which ruled that the beliefs of all non-profit 501(3)(c) organizations must be in accord with pubic policy. If for example gays are ever to be cast as a protective class to the Civil Rights Act of 1964, all religious exemptions would be swept away like match sticks in a hurricane. So these are simply what I would call smoke screens to lull religious opponents of this kind of legislation to sleep.

* * * * *

(CROSS-EXAMINATION)

[v. 16, p. 877]

Q. Now, you've got to be a member of a suspect class in order to make a claim of discrimination; isn't that right?

A. Yes.

* * * * *

[v. 16, p. 878]

Q. (BY MS. WINER): In your thinking, the way you have though about this and evolved your analysis and written about it, as far as you're concerned, you've got to be a

member of a suspect class in order to be able to make a claim of discrimination; isn't that true?

A. Well, a protected or suspect class.

Q. So, you've got to be a member of either a protected class or suspect class?

A. That is at least my understanding. Again, I'm not an attorney so that doesn't represent an expert opinion.

* * * * *

[v. 16, p. 879]

Q. Okay. Now, Colorado for Family Values' campaign slogan on Amendment 2 was no special rights; isn't that correct?

A. That's correct.

Q. But special rights is actually a meaningless term, isn't it?

A. It is a mainly meaningless term.

Q. Your further involved analysis revealed it was meaningless and irrelevant to the real debate; isn't that correct?

A. I believe that's true. And I also believe that hate as a family value is a meaningless term, as well. These are just political slogans.

Q. But if you could do it all now, if Amendment 2 hadn't passed yet, you wouldn't use no special rights as your campaign slogan because it is a meaningless term?

* * * * *

Q. You believe that the idea of no special rights is irrelevant to the real debate, don't you, sir?

A. I believe it is.

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TESTIMONY OF HARVEY C. MANSFIELD, Ph.D.

[v. 16, p. 988]

the witness herein, having been first duly sworn, on oath testified as follows:

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Could you please state your name and employment, sir.

A. Harvey C. Mansfield. I am a professor of

[v. 16, p. 989]

government at Harvard University.

Q. Is it correct you've been called by the State to offer opinion testimony on political and structural reasons on theory for constitutional reasons such as Amendment 2?

A. Yes.

* * * * *

[v. 16, p. 993]

THE COURT: NN is admitted in evidence and Professor Mansfield is received as an expert in those areas, political theory, political philosophy, political structures and

[v. 16, p. 994]

American constitutionalism.

* * * * *

Q. Could you briefly describe for the Court generally what the framers' theories of the American constitution are.

[v. 16, p. 995]

A. The American constitution is -- was a new kind of republic. A republic which had never been seen before, a large republic. All previous republics have been small republics which depended upon a strict education to teach people to trust one another. And were kept small so that the government would not be too large. Those governments suffered from terrible failings according to the founders. Those would be the republics of ancient Greek [sic] and also modern worlds Venus and Hong. For one thing they were too weak to sustain themselves against foreign entities. But they suffer from the problem of majority faction. Majority faction according to Madison's familiar definition and Federalist 10 is a group that acts contrary to the rights of individuals or against the public good. These majority factions were particularly prevalent in small republics because the people there could be activated by democracy and led into hasty decisions contrary to the rights or contrary to the public good.

So they proposed to replace this tradition of small republics with a large republic. This would be a large republic that would be strong enough to withstand foreign

entities and have a strong central government and a strong military and a strong executive power too, and which would not depend on a strict moral education but rather make greater appeal to self interests. And which therefore also would not depend on a homogenous nation, but on a heterogenous, one

[v. 16, p. 996]

composed of many different groups.

Q. And is that what we mean by our system of representative government?

A. Representative government is a way of making the large republic work. It puts government at a distance from the people. So that there were appointed judges and congressmen and the president or executives with terms were not immediately subject to the popular will once they have been elected. So in the large republic, it's kind of a constitutional distance between the government and the people which enables the government to liberate, slow things down, and prevent hasty decision.

Q. What role do state governments fit within that federal structure that you've just been describing?

A. Well, state governments retain for this large republic the advantages of small republics because they are closer to the people and they allow issues to be taken up at a closer and more visible level. And the state governments as well as local governments within the states allow the people to feel that the government as a whole belongs to them. This is also a function of the most popular branch of the federal government which according to federalists obviously is a house of representatives which is elected every other year.

So the government most [sic] both have this constitutional distance, this is a certain distance between the

[v. 16, p. 997]

government and the people, in order to make government work better and to make it more moderate, and there must be a connection between the government and the people. Some way of making the people feel that this government is theirs.

Q. Now, you mentioned the term "factions." What do we mean my [sic] factionalism or factions within our government?

A. Well, this same definition that Madison gave is still useful today. A faction is a group of people who acts contrary to the rights of individuals or contrary to the public good. And this is the evil which is epidemic. It's a popular government. They start with a commitment to popular or republican government and therefore they look to that evil or trouble which is most associated with that form of government.

Q. And what role does interest group politics play within that mix that you've been describing?

A. According to Madison's famous argument, the moral heterogenous people allows for different interest groups. And since it's a popular government, it will be ruled by the people. But being ruled by the people means being ruled by a majority of the people. However, in a large and heterogenus nation, there isn't any automatic majority. Every majority has to be composed because there isn't a simple or obvious majority that can have its will, so to speak, automatically.

So this composed majority consists of a compromise or a coalition of different groups.

[v. 16, p. 998]

Q. How do those coalitions form within our system?

A. Well, within our system, they form in a number of ways, but all of them requiring political activity, especially political parties with chief instruments of coalitions built in our system, but a private or semi-private so called pressure groups also play an important function in this system.

Q. You are familiar with the election surrounding Amendment 2. Is that an example of coalition building its proponents, Colorado for Family Values?

MR. EURICH: Objection. Leading.

THE COURT: The form of the question is leading. I will allow the Professor to answer. I have the sense it is the Professor who's testifying not the podium.

You may answer, Professor.

THE WITNESS: Amendment 2 seems very much to be in this tradition, American tradition of coalition politics because it represents an attempt by a small group at the beginning to convince a majority of Coloradans that this amendment is something they need. And in order to do that, they had to pull together others with different opinions somewhat from their own who were willing to agree on this particular language. And on this result. For example, not just those of the religious right or those who dislike homosexuals, but also, say, conservatives who are against intrusive government, and liberals who think that the addition

[v. 16, p. 999]

of gays to anti-discrimination ordinances dilutes the civil rights of other more disadvantaged groups.

So in our system, it wasn't the case that the single group beginning this movement was sufficient to pull it through. In order to do that, it had to moderate its fuse.

Q. (BY MR. TYMKOVICH): What sort of mechanisms did the framers counter balance the actions of interest groups?

A. Well, first of all, the large republic itself makes it very difficult, just because we have so large a heterogenus [sic] nation makes it very difficult for any one group to dominate. It always has to get a coalition of alike thinking but not perfectly alike thinking groups. So that what we have is a nation of minorities, there isn't any official majority in this country. And this is in short by the notion of representative government which puts the government as a whole at a certain distance from the people, and it is also in short by the system of federalism that enables state governments to give and to breathe freely within this larger atmosphere.

Q. Now, Colorado and a lot of western states have a tradition of the initiative and referendum mechanisms, popular democracy, plebiscites. How do such devices fit within the constitutional scheme that you've been describing?

A. Well, initiative and referendum are instruments from the progressive era. They were originally attempts and I think they are still such to bring government closer to the

[v. 16, p. 1000]

people. A kind of criticism of the original founding and a statement that the constitutional distance I was speaking of had grown too great and government needed to be brought back closer to the people. So the Colorado initiative which is very common in this country now [sic] been in Wisconsin, California and so on, and it enables the people to make a

change, from themselves, not necessarily through the parties. In fact usually not. In their constitution.

Q. And that process is another one of the checks and balances that you were describing?

A. Yes. This is one of the checks that goes to the attempt to keep government close to the people.

Q. How does the initiative mechanism relate to what you are describing as the large republic?

A. It requires since the State, after all, is not a locality or a neighborhood but in itself a larger republic than the republics of ancient Greece, it remembers there's a process of coalition built in and to be gone through in order to secure enough people to make a majority on such a measure as Amendment 2.

Q. I suppose we live in an imperfect Madison democracy. What sort of changes have occurred in American politics that relate to this process that you've been describing?

A. Well, you could look at the Civil War, Amendments

[v. 16, p. 1001]

13, 14, and 15th amendments which nationalized and constitutionalized the question of slavery, removing it from statewide decision and requiring a uniform national group. And in fact, most of the civil rights legislation has been of the same kind. It's constitutionalized or in the case of a Civil Rights Act of 1964 nationalized the question of civil rights in order to remove rights from -- the rights of individuals from the jeopardy they will be in if they were ruled over by local and fascias majorities.

Q. Could you relate to the situation we find ourselves in with Amendment 2.

A. Well, Amendment 2, I think, was an attempt of this kind to decide the question at the state level and to remove the right of local majorities in Boulder and Aspen and Denver to pass anti-gay discrimination ordinances.

Q. And why would our electorate -- what are some of the reasons why our electorate would want to do that?

A. They would want to do that to moderate the issue. Instead of having it decided by local majorities who felt very strongly and were concentrated, it should be decided more moderately by a statewide majority that is gathered in a way that it insures or at least gives a high probability of a compromise in the moderate solution.

Q. Why would the statewide coalition necessarily be more moderate than say the local coalition that you've

[v. 16, p. 1002]

described?

A. Well, it wouldn't necessarily but there's a good probability of it. There's as much probability as you can achieve by the use of governmental forum. The reason is in order to get a statewide majority, you have to moderate your views, and you have to appeal to people and counties in different parts of the state, both rural and city, and also to different interests of the state. And particularly to people who aren't closely ideologically involved in the question of gay rights.

Q. So in sum, then, could you describe how this process affects the dangers or the issues of factionalism that you've described.

A. Well, I think Amendment 2 was an attempt to reduce the danger of local fascias majorities who would pass intrusive anti-gay ordinances. And it will do so by requiring that the decision be made at the statewide level where the politicians have to think of the people in the middle, the moderates, and the centralists.

Q. Well, what would be wrong with just leaving the issue to local majorities, local governmental counties, local cities, which was the status quo prior to Amendment 2?

A. It could be done, and it is done I think wisely with many other issues. But on this one, the people of Colorado determined that they wanted a more moderate solution for the

[v. 16, p. 1003]

state uniformly than would be available to these three municipalities or others that might choose to join them.

Q. Now, Amendment 2 in effect is a restructuring of government. What type of issues would an electorate normally look to in placing such an issue say in the state constitution like Amendment 2 attempts to do?

A. Well, it would be a kind of issue where there might be a hiding partisan or inflamed minority that would want its way and get its way in certain municipalities to the disadvantage of the minorities living in that locality, just what I think happened in this case.

Q. Can a reconstruction of this sort support stability and respect for the political process?

A. I think so. First, it solves the problem more moderately and less intrusively. And second, it gives the people a sense that they can -- that the government is not alien to them, and that they can get together by their own

initiative, and thinking in a constitutional mode to produce a result that gives them a sense of satisfaction and accomplishment.

Q. In your opinion as a political theorist and teacher, is Amendment 2 an appropriate way to address that response and that structural concern?

A. In my opinion it is.

Q. What do we mean by the tyranny of the majority,

[v. 16, p. 1004]

and how does that fit into the process you've been describing?

A. The tyranny of the majority would just be a majority faction. Once again, evidencing it is a group acting against individual rights or against the public good, and that is the special problem of a popular government. Because in a popular government, the majority rules. It looks as if any majority that's ruling is legitimate because it goes along with a form of government as a whole. So a tyranny -- but actually it can be, a majority can be tyrannical. So it's a majority that looks legitimate but isn't. Therefore a particular problem in republican governments. If there's just a minority that's trying to impose it will, that's much easier to deal with because you simply say that's a minority and not the majority. But if it's a focus or tyrannical majority, there's a difficulty.

Q. Some might argue, for example, that Amendment 2 constitutes a tyranny of the majority. How would you respond to that accusation?

A. Well, that's the kind of debate which is what one would expect in an issue of this kind. I would respond by saying that the content of Amendment 2 is the least intrusive

both politically and morally of any other solution that's been proposed.

Q. Why would you say that, Professor Mansfield?

A. It's the least intrusive politically because it

[v. 16, p. 1005]

allows the local minorities who don't agree with anti-gay discrimination ordinances to live according to a regime of rights in which there's no protected status for them. And it's the least intrusive morally because it doesn't require you to take a stand one way or the other on the gay question. Even though there is a kind of moral consequence to Amendment 2; namely, that it doesn't result in the moral equivalence of heterosexuals and homosexuals.

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[v. 16, p. 1007]

Q. Now, plaintiffs have also argued that Amendment 2 somehow dismisses debate or reduces the competition among ideas. How would you respond to that criticism?

A. I think it proves the competition of ideas because, as I said, it takes the argument out of the extremes of both sides and brings the center or the people in the middle into it because Amendment 2 being a statewide question has to -- had to appeal to those voters who were not personally or deeply involved in the question of gay rights. It had to make -- the movement behind Amendment 2 had to make general and coalition building arguments. These arguments are more moderate and also have greater variety than the arguments of the yes and no which we find from the extremes.

Q. Plaintiffs have also argued that Amendment 2 exacerbates divisiveness without our state. How would you respond to that statement?

[v. 16, p. 1008]

A. I would say, no, that on the contrary represents a solution which permits a kind of live and let live policy, which offers the least intrusion into our lives and morals much – I think much less than a statewide anti-gay rights discrimination law would do.

Q. Why is that, Professor Mansfield?

A. That's because it justifies less intrusion of local or state government into people's behavior and attitudes. It provides more respect for the realm of the private both politically and morally because I have tried to show morally this is an expansive rather than a constricting solution that you find in Amendment 2.

Q. And Professor Mansfield, is it your opinion that Amendment 2 is an appropriate way to deal with that issue as you've described it?

A. I think it is indeed, yes.

MR. TYMKOVICH: Thank you.

* * * * *

(CROSS-EXAMINATION)

[v. 16, p. 1009]

Q. Have you looked at the campaign materials used by CFV, Colorado for Family Values to see whether or not in fact they were appealing to moderates?

A. I don't say that every group in the Colorado

[v. 16, p. 1010]

election was behaving moderately.

Q. Let me ask the question more precisely. You have not looked at the campaign materials used by Colorado for Family Values, have you?

A. That's right.

Q. So you aren't aware of the extent to which those materials included graphic descriptions of homosexual behavior, are you?

A. I got some inkling of that this morning.

Q. You would not consider that to be an appeal to moderates, would you?

A. It's an appeal to -- well, one of the groups in the coalition.

Q. But not to moderates?

A. Yeah -- yes, I mean you are moving my argument from moderation as a kind of result of having to appeal to many different groups to a group called moderates.

Q. But you would not consider graphic descriptions of homosexual activity by a fringe of the homosexual community to be an appeal to moderates, would you?

A. No, I wouldn't, no.

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[v. 16, p. 1012]

Q. What you call a hypothetical campaign you refer to it that way because you don't know what this campaign looked like, do you?

A. I think I do. I think that it was not just a campaign against pedophilia, but also in great part even much greater part based on an argument that government is too intrusive and it's a protected status for gays is the first step towards affirmative action for them and this certain resentment against this sort of special treatment.

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TESTIMONY OF JOSEPH EDWARD BROADUS

[v. 17, p. 1175]

the witness herein, having been first duly sworn, on oath testified as follows.

THE COURT: Thank you. Please be seated.

It appears not to be Morris [sic] Code.

DIRECT EXAMINATION

BY MR. KAY:

Q. Would you state your name for the record.

A. My name is Joseph Edward Broadus.

Q. Mr. Broadus, how are you presently employed?

A. I am presently employed as an Assistant Professor of Law at George Mason University in Arlington, Virginia, and also a Special Assistant to Carl Anderson on the United States Civil Rights Commission.

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[v. 17, p. 1177]

Q. What do your duties as special assistant to a member of the United States Commission on Civil Rights include?

A. They include both policy analysis and legal analysis of issues that have appeared before the Commission and evaluation of reports that come in from the National Advisory

[v. 17, p. 1178]

Commissions and the State Advisory Commissions that the Commission has. They are a wide range of duties. They are largely those of a special assistant who has to review and digest and make comment on matters of importance before the Commission.

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THE COURT: Professor Broadus is received as an expert in constitutional law and civil rights law and may give opinions under Rule 702 in those areas. His opinions, however, aren't going to interpret the law for the Court in the ruling that it must make.

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[v. 17, p. 1186]

Q. Has sexual orientation been addressed at the national level in either Title 7 or a separate act?

A. Sexual orientation has been repeatedly considered both by the Court as to whether or not it was within the inclusion of what was meant by sex within the meaning of Title 7 and by Congress because of repeated invitations and lobbying attempts to get it included inside Title 7. And significantly, despite a lengthy history of effort and many debates and considerations, Congress has never found the arguments related to sexual orientation inclusion persuasive.

In a similar way, it can be compared to the way

[v. 17, p. 1187]

Congress has treated other kinds of conditions which are viewed as being -- as having a behavioral language. For example, alcoholism is addressed and considered within the context of the Rehabilitation Act. Yet there are limits on the ability to consider it because it's recognized that it could be well end [sic] despite the fact that alcoholism represents -- may in some cases, as the Supreme Court has urged, in some cases have a genetic link, and despite the fact that it demeans a personality, despite the fact that it creates a dynamic social and other situations, despite the fact that people in this group people who are prone to be alcoholics and engage in alcoholism are looked down upon in society and discriminated against, despite all of those, there's a very special need for measuring behaviors that have -- that really are behavioral and measurable, and alcoholism is an example of it. Drugs are treated the same way. There are other conditions that people have attempted -- that meet those kind of criteria.

The same would be for sexual orientation. Compulsive gamblers, for example.

Q. Have you made an analysis of whether or not in your opinion it would be appropriate to place sexual orientation under Title 7 on the federal act or on a separate act like the ADA or an age discrimination law?

A. Yes, I have.

Q. And what is your opinion?

[v. 17, p. 1188]

A. My opinion is that the same that Congress has mentioned it would be inappropriate to do that. It has all of the problems that exist, for example, with alcoholism or some of these other conditions, and I would bring your attention, for example, alcoholism does not create a permanent protection for the party. It simply creates a protocol by which the employer and the employee can work over some period to attempt to cure -- to cure the problem. And if there's a failure in this process, then normal employment procedures can be taken to terminate.

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[v. 17, p. 1189]

Q. (BY MR. KAY): Mr. Broadus, in your review of the Boulder, Denver, and Aspen City Ordinances, what were you reviewing those for? What were you trying to determine from those ordinances?

A. I was greatly concerned with whether these ordinances contained provisions or were structured so as to have applications that would raise serious questions about whether or not they would impinge upon the right of free exercise of religion or association or whether or not they would impinge upon the rights of intimate association that

have to do with a family or the rights of parents to advise and counsel their children.

Q. And those rights that you were concerned they might impinge upon, where are those rights found in our system of constitutional government?

[v. 17, p. 1190]

A. Those rights are found in the First Amendment.

Q. What is your opinion on the Denver, Boulder, and Aspen anti-discrimination statutes and whether they impinge on those fundamental rights or not?

A. My opinion on the statute was, well, they vary in their terms and degrees. They all have terms that are deeply disturbing on their possible impact on those rights.

Q. And what are those terms and what are those potential impacts on those other fundamental rights?

A. In the case of the Aspen statute, it is the complete indiscriminate application of all these provisions to all of those interests without any effort, accommodation, or association or limit.

Q. And what are those accommodations? What could have happened to accommodate those fundamental rights of free exercise of religion, association, privacy, et cetera?

A. Well, as I said, the statutes vary. And in the Boulder and in the Denver ordinances, there are attempts to draft exemptions for religious institutions; although, there is not one that drafted, for example, to exempt religious and motivated conduct. Typical one is the inclusion of marital status as a category.

In other jurisdictions, it has been held that these marital status provisions apply to home owners or small units of renters, amounts to a violation of both a freedom of

[v. 17, p. 1191]

religion and freedom of association to choose in their home to have a provision under the penalty of even of just a misdemeanor but under penalty of criminal sanction denies a parent the right to control the environment. For example, if you are in a situation where you need to rent a room in your home that says that you can't make decisions about moral or ethical or other evaluation of character that is personal in any range is quite damaging to those associational interests.

I would say even, for example, the ability to choose the person whom shares your home on the basis of religion, something that we might not want to see happen in commerce, is a right that we might want to preserve in the privacy of one's home because one may want to choose intimate associates because of their ability to contribute to one's spiritual growth by your shared practice of religion. And there was -- you know, the notion that that person's right to do that, to live inside their own home perhaps and commune with people of their own faith and share their values that is something that is deeply recognized in our society for a long or for a lengthy period of time, and its trashed by these ordinances and in a disturbing way. They can proceed with complete disregard for that.

Q. Now, in your review of these three city ordinances, do they go beyond the classifications found in federal law for civil rights protections?

[v. 17, p. 1192]

A. Yes, they do. Yes, they do. They go well beyond the classifications found in civil rights protection.

Q. And do you have an opinion as to the appropriateness or inappropriateness of that?

A. I have an opinion as to the appropriateness of it. Part of it is -- grows out of a matter that I have just stated, and the other part grows out of the inclusion of what may well be broad enough to include behaviorially-based activity which has generally been against national policy. It's very bad policy to weigh on the side of, you know, one set of behaviors as opposed to another. Particularly, for example, behavior like marital status. If what we are talking about in marital status as one of these clearly spells out is putting the weight on cohabitation, it's at odds where the notion that there is a legal status of marriage since what it seems to say is that while this status of marriage exists it has to be meaningless in that no one can do anything to aid or abet it to proceed with complete irrelevance to a category that exists at least in part because it's been found to be in the vital interests of the state.

Q. Do you have an opinion as to whether adding all of these additional categories beyond what the federal civil rights laws provide for breathe disrespect for civil rights laws in general?

A. Yes, I do. And the answer is yes. I think one

[v. 17, p. 1193]

of the things that's happened is -- and its difficult to weigh the impact of this. For example, the ADA which definitely does address a very vital question of discrimination against the disabled is so loosely worded as to include within its provisions almost 80 percent of the American population, and we are just lucky that most of those people haven't had the opportunity to find lawyers and proceed in the system with their claims. We are just lucky that's the case. And one of the big debates over the enactment of the Americans with Disability [sic] Act was between people with no historic

or critical kind of disabilities, and those with like disabilities over what definition should be included in the Act. And most of that was loss but as to the kind of provisions that are here, for example, you know, escalating cohabitation, you know, to the status of a protected class definitely does bring the law into disrespect if for no other reason that it makes a mockery of those other provisions talking about how vital the central marriage is to the society.

And further, there has been a growing sense, you could even find it in the academic literature of debate about the religion and the efficacy of Title 7 law and effect upon American character itself, not of living in a society where we help the truly needy and we attempt to avoid doing injury, but the fact that we are evolving in a society of victimization where even those who are relatively well off seek to protect

[v. 17, p. 1194]

themselves as being needy and use the power of the State to gain what could be a special privilege.

Earlier I heard some discussion about whether or not these statutes or ordinances result in awarding of any special privilege to any class of person and, of course, the answer is that every civil rights provision ends up awarding special privileges. And it does that because the property right is vested in the owner. The right to rent or dispose is one of the great and honored roots in our society. So if you redefine a class that has a right to limit your discretion in disposal and use, you have transferred the property right from the prior title holder to this class. And that constitutes a very large privilege.

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[v. 17, p. 1196]

Q. Is there a concern in your opinion -- is there a concern with having all these different cities creating different classifications which are also different from the state civil rights protections group?

A. Yes. And I think the more troubling concern with these ordinances appear to be precisely the kind of warning that Madison issued with the Federalist about the potential abuse of local majorities. . . .

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[v. 17, p. 1198]

Q. Let's turn our attention now to Amendment 2. Have you made an analysis of how Amendment 2 relates to these concerns that you've expressed about the city ordinances of Boulder, Denver, and Aspen?

A. Sure. Yes, I have.

Q. And?

A. It's essential -- essentially what it does is say to these local governments that have been so completely reckless in their basic concern for the constitutional items in the areas of privacy and freedom of association, it says to them if you don't know how to play with your toys, we are going to take them away from you. You are simply not going to be permitted to legislate in this area.

Q. "This area" would be in the area of granting protected status based on homosexual, bisexual, and lesbian orientation?

A. Yes.

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(CROSS-EXAMINATION)

[v. 17, p. 1224]

Q. Now, you have already told us you have no idea whether there have been any abuses in Denver, Aspen, or Boulder on any of the concerns that you've expressed, right?

A. Yes.

Q. You've already told us you have no idea about that?

A. The only --

[v. 17, p. 1225]

Q. You have no information about that, correct?

A. The only information I have is from the record where the parties who supported the measure said that they had concerns about both what was happening inside.

Q. You don't know of any specific example of the kind of abuses that you think ought to drive this wholesale sweeping away of rights, correct? You don't have any specific knowledge?

A. No.

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TESTIMONY OF ROBERT P. GEORGE, Ph.D.

[v. 18, p. 1282]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Good morning, Professor George. Could you please state your name and place of employment for the record.

A. It's Robert P. George, and I teach at Princeton University.

Q. How long have you taught at Princeton University?

A. For eight years.

Q. What subject matters do you teach at the University?

A. Legal philosophy, civil liberties, American law and theory.

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[v. 18, p. 1284]

Q. Over the past couple of years, again, could you describe the subject matter of the courses that you've taught?

A. Yes, I have taught course [sic] in philosophy of law which considers issues at the juncture of legal, moral, and political philosophy, and particularly the relationship of law and morality. I've taught an undergraduate course on civil liberties. I have taught that course every year which takes a range of issues of civil rights and liberties that implicate important moral considerations. I have taught graduate seminars from time to time called American law and theory which is a consideration of the writings of American legal philosophers from about the time of the founding of the Harvard Law School, and again the emphasis of that course is on issues relating to morality and law. I have taught an undergraduate seminar in the Woodrow Wilson School of Princeton on alternate dispute resolution mediation and arbitration and so forth and the subject matters of that course, and I taught a freshman seminar last year on national law theory and the theory of law.

Q. Have you obtained any awards or fellowship as a

[v. 18, p. 1285]

result of your academic work?

A. Yes. I received various awards as an undergraduate at Swarthmore, and a scholarship there. I then received two outside fellowships to attend Harvard. I then got a fellowship at Harvard to attend Oxford.

Q. Have you done any additional work relating to your relevant background relating to your law degree?

A. Yes. I'm of [sic] counsel at a law firm in Charleston, West Virginia called Robinson & McElwee.

Q. I understand you are a Supreme Court fellow. What did that involve and when did you do that?

A. That was in the 1989, '90 Supreme Court term, and I was a Tom C. Clark Judicial Fellow on the staff of the Chief Justice and his administrative assistant.

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[v. 18, p. 1286]

Q. And have you written any books or edited any books?

A. Yes, I have. My book entitled Making Men Moral, which is subtitled Civil Liberties and Public Morality was published by Oxford University press last month. I'm the editor of a book called Natural Law Theory: Contemporary Essays, which was published by Oxford University press in 1992. And I'm the editor of a forthcoming work which is now in production called The Autonomy of Law: Essays on Legal Positivism, which will also be published by Oxford University press. All of those works have as their center piece issue considerations of the relationship of law and morality.

Q. And that was also the thesis of your book Making Men Moral?

A. Yes, indeed.

Q. Have you written any article in the area of sexuality or religious sexual conduct?

A. Various of my articles and in some respects my

[v. 18, p. 1287]

book touch on those issues, but I have written one article that is centrally focused on them, and that was a review essay, a long review of Judge Richard Posner's book Sex and Reason, which was published by Harvard University

recently, a couple of years ago, and my review is in Columbia Law Review.

Q. Professor George, since you are a Commissioner on the U.S. Commission on Civil Rights, could you explain your activity in that regard?

A. Yes. The United States Commission on Civil Rights was founded in 1957. It was created by Congress, and then under the 1957 Civil Rights Act, U.S. Civil Rights Act, it was then recreated and rechartered under the United States Commission on Civil Rights Act which was in 1983. It is currently made up of eight commissioners, all of whom serve part time. We have a chairman and a vice chairman. There is a full time staff director who oversees our staff in Washington D.C., and we have six regional offices of the Civil Rights Commission. Our jurisdiction extends to the investigation of allegations of the denial of voting rights based on various criteria, race, sex, religion and so forth, and more generally to make recommendations to Congress and the President for the reform of civil rights law where in the Commission's judgment have inquired into various matters, held hearings and so forth, the Commissioners believe that reforms are appropriate.

Q. What are the nature of the investigations that

[v. 18, p. 1288]

the Commission pursues of which you are familiar?

A. I have only been on the Commission since January of this year, so I haven't had an opportunity to be involved in a panoply of the Commission's activities, but since this time I can report that we held three and a half days of hearings on the causes of the Los Angeles riots and tried to take information from witnesses from Los Angeles as to how those tragedies could be avoided in the future. We have a comprehensive project which was to investigate racial and

ethnic issues in American cities. Prior to my joining the Commission, the Commission issued a report on ethnic tension in a Washington D.C., neighborhood that had experienced some rioting. We will, this spring, hold hearings in Crown Heights, New York, which has also been the scene of racial and ethnic tensions. The real focus of our Commission's work at the moment at least is in the racial and ethnic area.

Q. Professor George, what are the protected classes or groups under the jurisdiction of the U.S. Commission on Civil Rights?

A. Our statute does not frame the issue in terms of protected groups. It rather mentions categories. We, for example, investigate voting rights, allegations of voting rights, violations where the person making the allegation claims to have been denied the right to vote on the basis of race, sex, ethnicity, religion, age, or disability. I believe I have

[v. 18, p. 1289]

covered -- I believe I have covered them all.

Q. And sexual orientation is not one of those categories?

A. It is not.

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[v. 18, p. 1290]

THE COURT: Professor George is received as an expert in moral philosophy, government and political science, civil liberties and public morality. He may give opinion testimony under Rule 702 in those areas.

MR. TYMKOVICH: Thank you, Your Honor.

Q. (BY MR. TYMKOVICH): Professor George, you are a

[v. 18, p. 1291]

student and a teacher of American government. How do you define government power?

A. The authority of government to act for the sake of the public good.

Q. And what sort of theories of government do you teach?

A. Well, let me distinguish a couple of levels. When we talk about theories of government on the one hand, we might be talking about what I usually refer to as political theories. Theories of what the good government -- the best government, the ideal government would be like, how it should be run and what its concerns should be. We can contrast the political theory of Aristotle and Thomas Hobbes and an American political theorist such as John Rolls. Now, on the other hand, we might distinguish theories of government in the following sense: We might distinguish the type of government that we have at the federal level in the United States; that is to say, a government of delegated powers giving certain powers under our constitution but forbidden by the very theory of the constitution from exercising any powers that aren't given from governments like the governments in the several states' governments of general jurisdiction which exercise police powers, powers to protect public health, safety, and morals, subject to whatever constraints are imposed on those governments by the federal or state constitutions or by law.

[v. 18, p. 1292]

Q. Would you explain in a little more detail this intersection between law and morality, civil liberties and public morality that you've mentioned.

A. Well, I have written a whole book on the subject, and to do it justice, I would have to recapitulate much of what is in the book. The theme -- one of the central themes of the book is that government, particularly governments of general jurisdiction exercising policy powers.

Q. Such as states?

A. Yes. Very frequently of necessity make moral judgments. I'm very critical of the view, in my book, I'm very critical of the view that government ought to be or even can be neutral with respect to moral questions. The questions of law often implicate moral judgments that need to be made. Now, among these judgments are judgments pertaining to civil liberties. The proposition that people are entitled to exercise free speech within certain limitations, of course, is itself a moral proposition. The argument people ought to enjoy freedom of religion is a moral proposition. Many of the laws that we consider to be the great achievements of American politics, for example, our civil rights laws are state moral propositions. In many cases, controversial moral positions on which the state, the government is not, it shouldn't be, and it couldn't be neutral.

Q. Wouldn't there [sic] been a moral judgment that forms

[v. 18, p. 1293]

the basis of our principle or notions of equality?

A. Yes. Oh, certainly, certainly. The proposition stated in the Declaration of Independence that all men are created equally, certainly that's a moral proposition. We embody a proposition like that in our constitution, in law, on

the federal level, in the equal protection clause, and of course, many states have equal protection laws. Our civil rights laws aim to protect quality among citizens.

Q. Why do you say government does not and even cannot remain neutral on these questions?

A. Well, government has to decide, for example, whether people are entitled to freedom of speech or freedom of religion or equal protection of the laws or they aren't. There's no avoiding the question. Whichever way you come down on it, you've made a moral judgment. You can pretend that you haven't made a moral judgment, but you have. If you come down saying, no, people are not equal, people of a certain age are morally superior and inherently have a greater dignity than people of a younger age, and black people have less equality than white people, if you have made that judgment, you have made a moral judgment. In my view, incorrect moral judgment, but a moral judgment.

If you take the view of the Declaration and equal protection clause seriously and hold for fundamental equality of dignity, then you have stated a moral judgment.

[v. 18, p. 1294]

Q. You have written about what you call the moral ecology of communities. What do you mean by that, Professor George?

A. I mean by that the framework of expectations and understandings that's abroad in a community relating to issues of moral significance. Where people's actions will impact upon their character and likely impact upon others whose behavior is affected for good or for ill by their example. That's what I mean by the moral environment of

a community or the moral ecology of the community. It's that moral environment or moral ecology that is at stake in the traditional understanding of the police powers of states, as governments of general jurisdiction, exercising police powers, to protect public health safety and morals.

Q. Would the state of Colorado and its local communities -- its local cities, its local counties be a community that you described?

A. Yes. Again, subject to the particular rules of the state constitution in Colorado. I have not made a study of the constitution of Colorado. But I would assume that Colorado, like other states, is a governmental general jurisdiction, and the municipalities and counties and so forth in the state of Colorado participate in derivative fashion in the general jurisdiction of the state of Colorado.

Q. Now, in our system of government not only in

[v. 18, p. 1295]

Colorado but other states of general jurisdiction, how do we address moral issues politically and culturally?

A. Well, in certain areas, the moral issues have been addressed at the constitutional level. So an issue is as it [sic] were taken out of ordinary politics and put in the constitution. Now, often since the constitution cannot be made to apply clearly and unequivocally in every unanticipated case, it will be necessary for judges exercising their authority to interpret the constitution to make what are in effect moral judgments. Other times, the constitution does not remove the moral question at stake from the ordinary processes of politics, and therefore it's left there. Here, the people must deliberate and decide either through their elected representatives or themselves by initiative and referendum how to resolve the public policy question, which might very

well be a question of public morality that needs to be decided.

Q. How do we accommodate competing or different visions of public morality in such a system?

A. By argument. It's very important that free and fair opportunities for argument take place. It's critical that those who will ultimately decide the question, whether in the legislature or by referendum debate the issues and make the appropriate resolution. That is where the issue remains in the field of politics. If the issue will finally be resolved in court, then it's important that those responsible for ultimately

[v. 18, p. 1296]

making that decision entertain fairly and hear the arguments on both sides of the question. Since neutrality in a great many cases is impossible, and in any event, I think undesirable, it will be necessary for some points of view to win and others to lose. And of course, it's entirely possible that the people or their elected representatives or judges interpreting the constitution will make a mistake, so that the decisions regarding public morality that are made are the wrong decisions, they might be decisions that are too permissive, they might be decisions that are not permissive enough with respect to whatever the moral issue is that is in question. But since a decision has to be made, there will necessarily be those whose view will not win out.

Q. In your opinion, Professor George, is there anything illegitimate about pursuing moral judgment through electoral process?

A. There can't possibly be if we believe in democracy.

Q. Why is that, sir?

A. Well, these decisions will bear on us from all sides. They will have to be made. Virtually any issue will implicate at some level certain moral judgments or value judgment. Any political issue, unless we are to remove those issues through a philosopher king or something, they will be made by the people. Those decisions will necessarily be

[v. 18, p. 1297]

subject, in our country and in this state as well as my home state of New Jersey, subject to constitutional limitations. You can't do just anything in the name of public morality. You can't pursue the goal of having a sound moral environment, good public mortality [sic] by just any means. There are constitutional considerations, constitutional limitations on the means that can be used. And sometimes the ends that can be pursued. But subject to those limitations, political process is an appropriate one for resolving moral questions.

Q. What type of issues do we typically place in our constitutions either at the state or federal level?

A. Well, issues having to do with the structure of government, for example, how the government will be structured. Issues having to do with basic civil rights and liberties. Issues where the people in their wisdom wish to reserve moral judgments to themselves rather than having been made by their elected representatives. There are probably other categories that aren't coming to mind, but those are some.

Q. How does constitutionalizing an issue, placing an issue in the constitution, address some of those concerns?

A. Well, it's placed in the constitution -- that will have a couple of implications. One ordinarily at our federal -- in our federal government and at the state level, it will mean that disputes about its meaning will have to be

[v. 18, p. 1298]

resolved in courtrooms rather than at the ballot box, rather than at the polls. It also means that in effect the people have reserved that decision to themselves, and thereby taking it away from or not giving it to their elected representatives. I think that's the crucial implication. So the matter is no longer in the ordinary political process. A decision has been made by the people through the process of constitution making or amending the constitution, and if that's to be changed, it will have to be by the people again.

Q. Professor George, we have the text of Amendment 2 on the easel behind you, and on its face it appears to reserve and not address moral judgment about homosexuality in the state. Does a provision like Amendment 2 really weigh into the moral debate?

A. No. I have seen Amendment 2 before, but would you mind if I took a moment to read it again?

THE COURT: Go ahead.

Q. (BY MR. TYMKOVICH): Please do.

A. Well, Amendment 2 certainly embodies the judgment of political morality about the appropriate level at which to decide the question of whether there will be a protected class status bestowed on homosexual, lesbian, or bisexual orientation. So, to that extent, it does involve moral judgment.

Q. Is there anything from your reading of Amendment

[v. 18, p. 1299]

2 that would prohibit or somehow limit homosexual activity or behavior?

A. I don't see how it could be interpreted that way.

Q. Professor George, we in societies --

A. Could I also add that I don't see that it's inconsistent with prohibitions on homosexual conduct or certain forms of homosexual conduct. It doesn't require or embody any such prohibitions.

Q. Exactly. Subject to other provisions and conditions as the U.S. Supreme Court has interpreted it?

A. Certainly.

Q. Professor George, societies make political judgments about sexual conduct and sexual morality all the time, don't they?

A. Yes, they do.

Q. And societies address this troublesome issue of homosexuality, homosexual orientation all the time, don't they?

A. Yes, they do.

Q. Now, as a professor of philosophy, as a student of moral philosophy, if you could just very briefly describe some of the major philosophical traditions and how they have addressed the issue of sex morality or conduct?

A. Again, it would be impossible for me in this context to be very comprehensive, but if I could mention a few,

[v. 18, p. 1300]

that would be helpful. And if you want to raise more, I will be happy to do that.

The classical tradition of philosophy founded by Socrates and transmitted to us in the first instance by the

great student Plato and by Plato's great student Aristotle and picked up by the Roman philosophers and by the great midevil [sic] philosophers by Thomas Aquinas, that type of philosophy as it bears on sexual conduct tended to take the view that sexual pleasure should be sought only in the context of marriage. Now they differed on their conventions, different cultures in which this tradition was embodied differently in various respects as to their understanding of marriage, but in all of them that I know about, marriage was understood to be a committed exclusive heterosexual relationship, and it was in this tradition marriage has [sic] celebrated not only as a source of children but as a source of comfort and joy and companionship for the married spouses. An earlier challenger to this tradition was the traditional philosophy sometimes called hedonism. Hedonism differed radically from the mainstream classical tradition that I have just referred to as found by Socrates in its explicit celebration as pleasure, as a good, and in some cases as the highest good. According to the more radical hedonist, the way to life [sic] a valuable life was to live a life pursuant to pleasure.

These two traditions clashed, and you see the

[v. 18, p. 1301]

clash of the traditions in the writings of Plato and to a lesser extent Aristotle.

Q. To what extent did the hedonist or Platonic philosophers deal with this issue of shame and sexual conduct?

A. Well, the mainstream classical tradition of Socrates, Plato, and Aristotle is the one that took very seriously the idea that -- bad sexual conduct was shameful. It was damaging to the integrity of persons. It was corrupting of their moral character, and it was shameful, something that a person who had appropriate self respect would not indulge

in and would not subject themselves to the moral consequences of.

The hedonist tradition is quite different in that respect. I mean it's pleasure is good, perhaps the ultimate good and is to be obtained wherever it can be obtained without shame subject now to certain limitations. I mean even the most radical hedonists ordinarily would not approve of destroying others or hurting others in the pursuit of pleasure, but nevertheless subject to those limitations, pleasures should be sought and could be sought without shame, wherever it was to be obtained. Shame was an issue, but it was one where the classical mainstream tradition saw it as implementing bad sexual acts; whereas, hedonism tended not it [sic] see it implicated there at all.

Q. Who was the proponent of that view of sexuality?

A. I think its primary proponents are -- might not

[v. 18, p. 1302]

be real historical figures. I think it's best understood as it's put in the mouths of Socrates opponents and interlocutors of Plato's dialogs involving Socrates. So you have the character Calaclees in the dialog making it very powerful and there are other figures in other Platonic dialogs who play the same.

Q. Do they make that argument about sexuality?

A. Yes, in the Gorcegus you get a lively exchange between Plato and Socrates who is to be representing Plato's own view and Calaclees over sexuality and particularly over homosexuality, and you get what to my mind is quite a clear condemnation of homosexual conduct by Socrates, and we can infer by Plato. That inference is buttressed by Plato's own later work particularly in the laws where we get a

closer rejection of homosexual conduct and other forms of non-marital sexual conduct.

Q. Now, you've mentioned two major philosophical traditions. Are there others that you've described?

A. Certainly there are variances of the hedonist tradition. In the Roman tradition sometimes called epicureanism. Precise definition of epicureanism are controversial but people regard that as a highly hedonistic sort of tradition. Later we got the development much much later the development of a school thought called ulitarianism and ulitarianism is the view that we live well, we do the morally

[v. 18, p. 1303]

right thing when we maximize good and minimize evil, and some of the leading, in fact possibly the person we consider the founder of ulitarianism provision Jeramy Benship understands good and evil in hedonistic terms. He said that men are under two masters, pain and pleasure. When we say maximum good, we mean maximum pleasure. And some of Benship's later disciples rejected hedonism while maintaining his view that the maximum of ethics ought to be maximum good, and minimum evil, but what they were replacing was his hedonistic conception of good and evil. But there are even among contemporary ulitarians there are people who differ on this issue. Others rejected hedonism. The thing that links them together as ulitarians or as philosophers say, conventionalists is the method of moral judgment, the method of obtaining good consequences and minimizing bad consequences.

Q. What are the other major philosophical traditions?

A. You certainly have more traditions of philosophy that are embodied in the great religious traditions of the west. There's a very powerful and important string of Jewish philosophy, a family of traditions rather than a single

tradition. There's a very powerful philosophical tradition in the Islamic tradition. Islamic philosophy flourished in the middle ages and carries on today. There is a strong tradition -- there's several strong traditions of enlightenment

[v. 18, p. 1304]

philosophy. Let me name two of them. One is the tradition of moral skepticism of which the philosopher David Huhm was the leading figure. And this is a tradition of radical doubt with the capacity of reason to make moral judgments. This tradition was -- came into conflict with the enlightenmnt [sic] tradition of a German philosopher named Kant, K-a-n-t. And Kant held for the ultimate rationality of moral judgments; saw moral judgment as a matter of pure practical reason.

Q. And how did the religious traditions fit into that [sic] others that you've described, the Judaic tradition?

A. Well, you get feeding into the religious traditions are thoughts from religious thinkers outside of those traditions as well as from secular thinkers. So, for example, the Christian tradition of philosophy which emerges as a strong tradition of philosophy in the middle east, like figures like Thomas Aquinas takes other large sectors of the classic tradition of Plato and Aristotle.

The same is true of important traditions within Jewish philosophy. And Jewish philosophy and Christian philosophy in the middle ages also engage with one another and have an impact on each other. Enlightened philosophy engages with Christianity as well. We ordinarily think of Kant as a secular philosopher, and that's true in the sense that he did not appeal to divine revelations for moral judgments. In that respect, he was what is sometimes referred to as a natural law

[v. 18, p. 1305]

philosopher or he was not in the philosophy of Thomas Aquinas but he happened to be a Christian, and his thought is drawn on by many contemporary Christian philosophers.

Q. Professor George, if you could summarize, please, how did these various traditions, these various schools of thought deal with the issue of sexual conduct in general and homosexuality in particular?

A. I think it's fair to say that all of these traditions took the question of sexual conduct very seriously. They saw it as a central moral question and one to be resolved for those that believed in the power of reason to resolve moral problems by reason. Here, of course, the outlier [sic] would be those schools of ethical thought that are skeptical of the power of reason. For example, Humes thought, and for people in that tradition, reason has no real ultimate power to resolve those questions. Humes said that reason is not only to be the slave of passions and should never pretend to do anything other than to serve and obey him. So his view of sexual morality, although I don't know his scientific teachings on it, one would, I think, infer from what he says that questions of how one ought to conduct one's self sexually are essentially pragmatic questions; that bad sexual conduct would be sexual conduct that would have bad consequences for one or others for one or others or people around others or one's society.

Other traditions treat these questions as serious

[v. 18, p. 1306]

moral questions and questions to be resolved by reason, not necessarily questions that can be answered by mechanical knowns [sic] cranking out the computer solution to a question of sexual mortality [sic] but rather by the very careful synthetic reflection that's necessary to resolve any complicated moral question, whether in the area of sexuality or any other area.

Q. Bringing then these issues into the 1990's, how do these traditions affect the way we make laws and make decisions about public morality today?

A. Well, there's not a Kantical tradition today. There's not a single tradition of philosophy that has the whip hand that controls our public life. We share, as a society, we share a number of moral beliefs, but we divide on others. And among those on which we divide are those having to do with sexual conduct. And it's interesting to me that people from different traditions can join together reaching the same conclusions influencing each others' judgments on one side or the other of these debates.

Q. How do you mean that?

A. Well.

Q. In particular, this debate about how we regulate sexual conduct or even homosexuality in our society?

A. An Aristotelian who would reject certain of Kant's philosophy would nevertheless quite rightly join up with a representative of Kantean philosophy in rejecting certain

[v. 18, p. 1307]

sorts of conduct including homosexual conduct. Sometimes there are some Aristolelians and some Kanteans who would reject the specific teachings of Aristotle and Kant on homosexual acts or converse to sexual acts and would join together despite their philosophical differences in arguing for the moral value of homosexual conduct.

Q. Would such moral judgments be rational in your opinion, Professor George?

A. The debate is a debate about reasons. It's in that respect a rational debate. Rational arguments are to be made

on both sides. One has to decide and if one is a public policy maker or if one is a citizen of the state that's trying to decide a public morality issue by referendum, one has to decide where the sounder reasons are as far as one could see what the truth of the matter is that's got to be decided, but it has to be decided, it seems to me, by evaluating the reasons that are given on both sides, the philosophical arguments that are to be made for and against. It's a rational debate.

Q. You couldn't say that one side of the debate or the other is acting erratically or invidiously or prejudicially, would you?

A. It depends on the particular debate. If somebody is lying, or manipulating the debate, then people are not engaging in rational argument. But on the other hand, it's possible in all these areas whether with regard to sexual

[v. 18, p. 1308]

morality or other controversial moral questions to debate the issues in a rational manner where nobody is lying, nobody is manipulating the debate. People are putting forth their reasons and going with their best judgment and coming into intellectual contact with those who see it a different way. And we have to argue it out. And we might change each other [sic] minds in some cases. Someone will hear the arguments on both sides and make the decision on that, but it's a debate on which arguments can be put forward on both sides.

Q. That's what we mean by politics?

A. At it's best, that's what we mean by politics. Politics is the reason for public action on both sides of controversial issues.

Q. Is it safe to say in this debate over how we regulate homosexuality that there are reasonable people on both sides of the issue?

A. Oh, absolutely.

Q. Professor George, you indicated that laws or social regulations pertaining to sexuality or homosexuality in particular are not based on prejudice or religious beliefs, why would you say that?

A. Could you repeat your question. I'm sorry, I couldn't hear it.

Q. You indicated that laws pertaining to sexual morality or homosexuality in particular are not necessarily

[v. 18, p. 1309]

based on religious or sectarian beliefs, revealed reason. Why do you say that?

A. Well, I say that because reasons can be given serious significant arguments; in fact, have been given on both sides of these questions. It's possible for someone to give an argument in favor of the value of homosexual activity without that argument simply being a reflection of that person's desire to engage in that activity or have others engage in that active [sic]. In other words, instead of relying on one's sentiments or desires, one can give reasons. On the other side of the issue, the same is the case. Someone can simply opt out of rationally thinking about the issue and simply denounce homosexual activity without a moment's thought because it happens to not strike him as a good idea or that person can consider the advanced reasons that can be given against homosexual conduct.

Q. Would it be legitimate for people to bring those religious motivations to the public debate?

A. I don't think I referred to religious motivations. I'm talking about the reasons, the publicly accessible reasons that can be exchanged between people who might not share the same religious views or belong to the same religious tradition. Many people have religious beliefs.

Q. How have those religious beliefs affected their views on civil liberties and on public debate about law?

[v. 18, p. 1310]

A. Well, people's religious beliefs fit into their general moral and political beliefs in many ways, and it depends on the individual person. Sometimes it depends on the individual religious tradition. Some religious traditions are more comprehensive than others about matters of political morality, personal morality, and some individuals accept by-in-large the teachings of their religious tradition. And others stay in the religious tradition in some sense while rejecting many of its teachings.

The key thing is that these issues can be publicly debated by people of different religious convictions, giving and exchanging reasons without any necessary appeal to revealed teachings that are not accepted or -- by people who aren't members of that religion or to which they have no access since they are outside of a religious tradition.

Q. Even if people did bring specific religious concerns to this public debate, is that legitimate?

A. Yes. I think it is legitimate the same way it was legitimate for Dr. Martin Luther King to appeal to the religions in advancing the cause of civil rights. It's a mistake to ask people to ignore or lay aside their religious traditions. It's unfair. I think it's a violation of their own civil rights. I think that it would, in effect, disenfranchise

religious people from participation in public debate, but what religious people can be asked to do is, in the public argument,

[v. 18, p. 1311]

present public accessible reasons for the points of view, whether pro or con on homosexual conduct or any other issue, publicly accessible reasons that they have to present.

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[v. 18, p. 1313]

Q. In your opinion, Professor George, does Amendment 2 endorse or promote a particular version of moral philosophy?

A. I don't believe it does. It seems to me that

[v. 18, p. 1314]

people from various viewpoints, philosophical backgrounds could approve or disprove [sic] of Amendment 2. I can't say that's an Aristoleian or hedonism amendment or Kantean amendment or Hobbesean amendment.

Q. What do you believe it does then?

A. I believe it forbids political subdivisions within the state of Colorado from making laws that would give protected class status on the basis of homosexual, lesbian, or bisexual orientation. It in effect constitutionalizes the debated question of whether this should be civil rights type protections that are based on sexual conduct or sexual orientation.

Q. And in your opinion, Professor George, is that a legitimate approach to civil liberties in our system of government?

A. Yes. It seems to me it's an appropriate approach. It would not be inappropriate to take a different approach, but it's not inappropriate to take the approach that Colorado has taken either by constitutionalizing the issue. I would say it's appropriate to not constitutionalize it. It's appropriate to constitutionalize it. The people of Colorado have to decide.

Q. On this issue of regulation of sexual conduct, what does society care why do we draw lines in this area, Professor George?

[v. 18, p. 1315]

A. Because the moral environment the moral ecology of the community has an impact on everybody in the community. That framework of expectations and understandings that bear on various ways on ourselves, our family and our children is an important matter. It affects our institutions. Institutions of marriage and family, for example. It affects our whole self understanding. Our understanding of ourselves as sexual beings, for example. Our understanding of ourselves as people who are personal. We are not just things, but we are persons. Our bodies aren't just things or instruments. They are part of our personal reality. If understandings emerge that treat us, treat people as instruments, those will have profound impacts on institutions like marriage in the family that we value. Now, of course, it might be that some people's best considered moral judgment is that our bodies are instruments; that our bodies are subpersonal realities; that the manipulation of the body by consciousness in pursuit of satisfaction is an appropriate way to lead a life. Some people might take a modified or more hedonist approach, but that has to be argued for if someone thinks a value would be something that protected sexual pleasure, that has to be argued for. I, myself, would reject it, but I think it has to be argued for.

* * * * *

(CROSS-EXAMINATION)

[v. 18, p. 1325]

Q. And you have not studied the political debate about homosexuality in Colorado, correct?

A. I have not studied it. That's true.

Q. So to the extent you told us earlier that the quality of that debate will depend on whether there's lying or manipulation or any of that sort of thing, you don't know whether that occurred or not?

A. Well, I don't know from the sense of direct knowledge, but I do know this much, even in Plato's dialogs which are put forth as models of debate, not all the argumentation that Plato depicts for us there is fair or unmanipulative. Even in the best versions there will be necessarily and I would be surprised if it didn't happen in Colorado on both sides of any issue, any issue where the passions are engaged, those who fall short of rational argument. So although I don't know the specifics, I wouldn't be surprised if on one side there was lying and manipulation and on the other side there was also lying and manipulation.

* * * * *

AFFIDAVIT OF JAMES HUNTER

James Hunter, being duly sworn, states as follows:

1. I am a professor in the Departments of Sociology and Religious Studies at the University of Virginia. I have held this position since 1989. I was initially appointed as an assistant professor in 1983.

2. I received my doctorate at Rutgers University in 1981. My fields of concentration are in the history and sociology of American culture, religion and politics and in sociological theory. I have published 6 books and over 2 dozen essays in these area. My book, *Culture Wars: The Struggle to Define America* (Basic Books, 1991), is currently in its sixth printing. It was a finalist for the 1992 *L.A. Times* Book Award. My book, *Evangelicalism: The Coming Generation* (University of Chicago Press, 1987), was winner of the 1988 Distinguished Book Award of the Society for the Scientific Study of Religion and also selected by *Choice* as one of the outstanding scholarly books of 1987. My edited book, *Articles of Faith; Articles of Peace: The First Amendment Religion Clause and the American Public Philosophy* (Brookings Institution, 1990), was winner of the 1991, Gustavus Myers Award for the Study of Human Rights).

3. The purpose of this affidavit is a) to place the dispute over Amendment 2 in a larger cultural and political context; b) to outline and criticize a theory of power used to claim that gays and lesbians are politically powerless; c) to offer an alternative conceptualization of power and to offer evidence of the nature and extent of power gays and lesbians have acquired; and d) to summarize what is at stake in this dispute and why the referendum process is one legitimate means for addressing such disputes.

4. The first point to be made is that the controversy over Amendment 2 in Colorado is not an isolated and eccentric dispute but one that is national in character and rooted in the American public's most deeply held beliefs and values. It is a microcosm of a larger culture war waged in America today. To be sure, homosexuality and gay rights in particular, comprise one set of conflicts in a larger culture war. Other areas of dispute would include abortion, funding for the arts, the relationship between church and state, and content of public school textbooks, sex education, multiculturalism, among many others. Certainly the controversy over homosexuality and gay rights is among the most divisive of the culture war.

5. As with most issues of the culture war, there is a deeper symbolic struggle underneath the particularities of the dispute over Amendment 2. In the case of homosexuality and gay rights, the fundamental matters at stake are "what constitutes normalcy in regard to human sexuality" and "what constitutes legitimate family structure, order and relations." This set of issues implicit in Amendment 2, then, touches upon what Americans view as good, right and proper for aspects of their social life. In a larger context we should see the dispute in Colorado over Amendment 2 as part of a deeper symbolic struggle to define the "first principles" of how Americans will order their lives together.

6. The culture war, of which the dispute over Amendment 2 is just one instance, is not rooted so much in politics or in the older political party divisions. Rather these disputes are rooted in different and competing systems of moral understanding. The principles and ideals that mark these systems of moral understanding are by no means trifling but have a character of ultimacy to them. They

provide a source of collective identity and a basis for cohesion in the communities that hold them. This is why claims by opposing moral communities seem so incommensurable.

7. It is because the differences are at root moral in character that there is usually dispute over the meaning of law itself. In the case of Amendment 2, one side believes that the referendum inhibits the protection of *basic* rights; the other side believe that the referendum merely inhibits the creation of a new class of *special* rights.

8. Precisely because of the "character of ultimacy" motivating such groups that it is inaccurate to construe the competing moral values and commitments involved in the disputes over Amendment 2, gay rights more broadly, or over the culture war at large, as between religious values and commitments on the one hand, and non-sectarian or neutral values on the other hand. The reality of the situation is much more interesting and complicated.

9. For one, formal religion exists on both sides of these disputes. Those that morally oppose homosexuality and the expansion of gay rights tend to be religiously conservative in their orientation. Those that favor the expansion of gay rights are not, by contrast, religiously neutral. In every major mainline Protestant denomination, in the larger Catholic community and in the largest movements in Judaism, there are gay and lesbian groups and each of these draw upon the theological and religious resources of their traditions to justify their moral and political claims.

10. Even those who claim no explicit theistic commitments are not somehow religiously neutral. In social science and philosophy, secularity does not mean moral or religious neutrality. As theoretical and empirical work in the sociology of knowledge has demonstrated, all knowledge is

based upon certain "faith" assumptions. There is, then, a fiduciary nature to all world views or cultural systems, even when they are secular in nature. For this reason one always finds a sectarian (and even fundamentalist) moral fervor among secularists involved in these disputes.

11. The competing moral visions at the heart of today's culture war take expression as polarizing tendencies in American culture. Most Americans occupy a vast middle groups between these polarized rhetoric. This is also true when studying the opinions of the citizens of Colorado as they reflect upon homosexuality and Amendment 2. Indeed, the sociological and cultural make up of average citizens supporting Amendment 2 and opposing Amendment 2 is remarkably variable. This is to say that voters approach this public policy and the issues surrounding it with a variety of perspectives and range of interests.

12. Where the polarizing tendencies in American culture tend to be sharpest is in the organizations and spokespeople who have an interest in promoting a particular position on a social issue. These organizations have tremendous power to shape public debate.

13. In the context of the larger cultural conflict and the conflict over homosexuality in particular, the view that gays and lesbians are "politically powerless" is simply untenable.

14. The most obvious flaw of the argument (as articulated by plaintiff's witness, Professor Kenneth S. Sherrill) is that it is ahistorical; it is, for all practical purposes, blind to a movement that is rapidly growing and changing. There is no question that gays and lesbians have been, even in recent generations, essentially voiceless, and thus powerless. But to contend that little or nothing has changed in recent decades, that gays and lesbians remain relatively "politically powerless" in American public life, is

silly. This argument would deny or underplay the emergent and now dynamic character of the social and political movement surrounding the gay and lesbian experience in America.

Conceptualizing Power

15. Though the most obvious flaw of the argument is that it is ahistorical in character, its most serious flaw is that it builds upon an understanding of power that is one-dimensional and out-dated; an understanding that is no longer accepted at face value in mainstream social science.

16. This older model (and the one employed in Professor Sherrill's perspective) defines power as the probability of individuals or groups realizing their will even against the resistance of others. As this perspective evolved within the discipline of American political science, the term gradually acquired a certain behavioral meaning. Power came to be understood as what some people *do* to others. It is observable when one group achieves a course of action even in the face of opposition. Such a view generally presupposes *openly* conflicting relations among opposing parties. Most commonly, this view has been applied to the study of the dynamics of the modern state. In this context, power emerges out of the resolution of conflicting and competing interests (typically measured by policy preferences and articulated grievances) through a process of formal bureaucratic decision-making.

17. The two cases offered up by Professor Sherrill as illustrations of the political powerlessness of gays and lesbians fit his theoretical assumptions perfectly. The first illustration of "political powerlessness" is the failure of gay people to prevent congressional enactment of legislation mandating the Centers for Disease Control to withhold life

PUBLISHER'S NOTE:

Page(s) 242 missing in original.

shape in four analytically-distinct expressions: military, political, economic, and ideological. These are overlapping networks of social interaction which reflect distinct (but related) institutionalized mechanisms for attaining human goals.

21. Mann's work is only an example. One could also mention the pathbreaking work of Stephen Lukes, Michel Foucault, Jurgen Habermas, Roberto Unger, Pierre Bourdieu among others. Part of the problem is Professor Sherrill ignores the theoretical developments contained in their work; developments that have formed the cutting edge of theoretical thinking *since* the 30s, 40s, and 50s when Robert Dahl and Harold Lasswell (scholars upon whom Professor Sherrill relies) were publishing.

22. What most of the theorists since Dahl and Lasswell have insisted upon and emphasize, in one form or another, is that power, in its most thorough and complete expression, involves the capacity to define reality in society; an ability to set the agenda for society.

23. In this perspective, power can be understood as the capacity to determine what social and political issues are relevant or irrelevant, what in social life is to be singled out for praise or condemnation (e.g. measures of good and evil), what standards may be imposed to measure justice or fairness. To suggest that power ultimately involves the capacity to influence the agenda of social life is to suggest that power exists as the capacity to persuade, to convince, to even shape the consciousness of people. Thus, power not only involves what is *done* to others; it also involves what is authoritatively (if not convincingly) *communicated* to others. This explains why it is that battles over public policy are very often battles over language: those controlling the

language of a debate will likely have the upper hand in its outcome.

24. The exercise of power at this level involves political/legal/cultural activities oriented toward "the production of common sense." Such activities not only aim at framing particular positions as superior to all others, they also strive to make the reasons for that superiority seem "natural". The capacity of a social group or movement to make its *particular* preferences and practices seem natural, then, is the key to its control. These particularities of preference and practice become standard throughout society while shrouded in a cloak of neutrality. Reality, then, is redefined so thoroughly and completely that the very categories by which disagreement is articulated and organized are delegitimated from the outset. The very ground by which dissent could be put forward is ruled out of bounds.

25. The reason I emphasized the more recent and more nuanced conceptualizations of power is because the conflict I have called the culture war -- of which the dispute over Amendment 2 is but a case study -- is at heart a *cultural* conflict, not a political conflict. Cultural conflict obviously has political implications but at the heart of cultural conflict are competing definitions of reality; competing moral visions of public life. In short, the *only* way to analyze this situation adequately is to work with a conceptualization of power appropriate to the kind of conflict taking place. At the very least this means that one must employ a multidimensional approach to power and its manifestations.

26. In a multidimensional approach to the conflict at hand, one can see that legislative gains or losses is only one way of measuring the relative power of a group. The power of a group or subculture must also be measured by a) its relative legal and political standing vis a vis the state (including the standing of claims made against the state for the redress of grievances, the representation of positions and advocates in political bodies, etc.), b) the relative size, coherence and strength of the social movement that forms the infrastructure for the various legal and political claims made, c) the social location of the group or movement, and d) the relative recognition of the group's existence in the popular imagination and in public culture and the relative legitimacy of its claims among non-group members.

27. **Legal and Political Standing:** Once again, legislative victories or losses is a very narrow gauge of political power. Given the conflicting nature of social and political change, any collective action vis a vis the State is an assertion of power.

28. Consider first the claims for redress of grievances made in the judiciary. In the last twenty-five years (according to a LEXIS search of homosexual discrimination cases), 285 federal and state court cases concerning the discrimination of homosexuals are on record. The majority of the cases dealt with discrimination in employment. But there have also been the full range of cases involving the child custody rights of homosexual parents, homosexual marriages, application for funding or institutional approval of gay organizations, housing or rental discrimination, the membership rights of homosexuals in private organizations or clubs, the rights of homosexuals to march in public parades, the legality of military recruitment on university campuses where conflicting stances toward homosexuality

exist, gays discharged from the military, the rights of religious universities to not officially recognize or fund gays organizations, the treatment of homosexual prisoners, the applicability of Title VII to discrimination matters based upon sexual orientation, the obligations of insurance companies to cover health benefits of an employee's homosexual partner, and so on.

29. Such cases have not emerged randomly over these years but rather have increased dramatically. In 1968, for example, there was one case; in the 1970s there were 35 cases; in the 1980s there were 170 and already in the 1990s there have been 79. Litigation obviously requires financial and legal resources. At the very least, the growth in the number of these cases is a measure of an expanding confidence and sense of entitlement among gays and lesbians that the courts can and will take seriously their claims.

30. The trend in the actual outcome of these cases is also quite tolling in this regard. When excluding cases that evoked split decisions (affirming in part; denying in part) and cases in which homosexuality is referred to only in a tangential manner, there is a clear pattern of successful litigation over the past 25 years. In the 1970s, 30 percent of the court decisions favored gays; in the 1980s, 45 percent of the court decisions favored gays; and already in the 1990s, 50 percent of the court decisions favored gays.

31. Over the years, the courts have been the most sympathetic toward discriminations claims made in the areas of private sector employment and housing. They have been the least sympathetic toward discrimination claims made in the area of homosexual marriage, child custody, and homosexual conduct in the military. Yet even in the cases concerning homosexuality in the military, public policy cited by the plaintiffs as a demonstrated area of gay political

powerlessness, the story told through these court cases points to a growing leniency toward homosexuals in the military.

32. In all, the image evoked by all of this litigation is that of a battering ram repeatedly hammering against the gates of traditional institutionalized restrictions against homosexuals and homosexuality. The gates have not been pushed open in all ways but the hinges are clearly weakening and the wood is noticeably splintering. Such is a measure of the power of gay and lesbian collective action.

33. Beyond the growing power of gays and lesbians to press their claims in the judiciary, there is the growing ability to mobilize resources in the realm of electoral politics.

34. The Human Rights Campaign Fund (founded in 1980) with an affiliated political action committee (or PAC) has seen an increase in its budget over the past 6 years from $846,000 (in 1987), to 1.9 million (in 1989), to 4.5 million (in 1991) to 5.5 million (in 1993). Even in 1988 the HRCF was the ninth largest independent PAC and 25th on the Federal Election Commission's list of fundraisers.

35. In 1992 the first PAC to support homosexuals only, the Gay/Lesbian Victory Fund, emerged. The group's chairman, David Mixner, observed in the *Washington Times* (January 21, 1992) that "[t]wenty years ago we couldn't get them [politicians] to take our checks." Compared to today, "it's like night and day . . . . Obviously, the next step is to run our own candidates."

36. This process was already well-underway. In 1980 there were fewer than half a dozen openly gay elected officials around the country, but by 1990 that number increased to 50. According to the National Gay and Lesbian

Task Force, there were 52 openly homosexual elected officials by 1992.

37. Even through the conservative Republican, Reagan-Bush years, gays and lesbians were asserting their political clout. In 1980, the *Washingtonian* announced that "gays were [Washington, D.C.'s] Mayor Marion Barry's key voting bloc."

38. As is well-known, in the 1992 Presidential campaign, homosexuals were important if not decisive to Clinton's win. Gays and lesbians contributed more than $2 million dollars into the Clinton campaign fund. As Norman Ornstein of the American Enterprise Institute said in *The Advocate* (January, 1993), "[t]he gay community provided Clinton with tremendous logistical and financial support. It is a force to be reckoned with." Tim McFeeley, director of the Human Rights Campaign Fund, was even more bold. Said he, "[Clinton] was elected president on the strength of the gay vote, and he knows it. If you're a politician and know you are elected on the strength of a constituency, you have to pay attention to that constituency."

39. To suggest that these developments are unimportant in assessing the relative power of gays and lesbians in American society is to deny the claims of the gay and lesbian advocacy groups themselves.

40. Consider, for example, the assessment of The National Gay and Lesbian Task Force of its own power. In its own literature, the NGLTF boasts of having "won countless victories for lesbians and gay men." Among their "accomplishments" they list the following: In 1974, they "successfully lobbied the American Psychiatric Association to remove homosexuality from its list of mental illnesses"; in 1975 they "obtained a U.S. Civil Service Commission

ruling that gay people can serve as federal employees"; in 1977, they "organized the first official White House meeting with gay activists"; in 1978 they "successfully lobbied the U.S. Public Health Service to stop certifying gay immigrants as 'psychopatic personalities.'"; in 1981 they launched a successful national campaign to defeat the anti-gay Family Protection Act"; in 1985 they "won a Supreme Court decision in *NGTF v. Oklahoma* overturning a law that prohibited gay teachers from discussing gay rights"; in 1987 they "secured House of Representatives passage of the Hate Crimes Statistics Act, the first federal law to address sexual orientation"; etc. In this light the NGLTF literature speaks of its "unparalleled clout." (All of these quotes come from a brochure of the National Gay and Lesbian Task Force "leading the fight for freedom".)

41. I agree with the National Gay and Lesbian Task Force's self-assessment. The other evidence of collective action vis a vis the state mentioned here is of a fabric with that assessment.

42. **Movement Infrastructure:** Even so, to say that the power of a group or subculture can only be measured in terms of its actions relative to the state is naive. Engagement in public policy typically emerges from the vitality of a social movement. Social movements provide the infrastructure for legal and political engagement. The size, coherence and strength of that infrastructure, then, is very relevant for a proper understanding of a community and its power.

43. According to my calculations from the *Encyclopedia of Associations* (Washington, D.C.: Gale Research, Inc.), there are presently 93 nationally-based gay and lesbian organizations in America today. These organizations range broadly in concern. As Urvashi Vaid, former executive

director of the NGLTF described them in the *New Republic* (May 10, 1993), "[t]here are now professional associations in every field -- legal student, minority, lesbian groups, sports leagues and cultural organizations providing support for every identity in the gay and lesbian world."

44. Most importantly, the number of such organizations has expanded dramatically over the past three decades. Only one such organization existed in the 1950s, 6 were founded in the 1960s, 40 were founded in the 1970s, and 44 were founded in the 1980s. Two more have been founded in the opening years of the 1990s.

45. These organizations have control over increasingly large financial resources. The Human Rights Campaign Fund, mentioned earlier, has a budget of 5.5 million dollars. The National Gay and Lesbian Task Force has a budget 3.3 million dollars (up from $687,750 in 1987). The Lambda Legal Defense and Education Fund has a budget of 1.8 million dollars (up from $677,360 in 1987). Indeed, twenty percent of the organizations listed in the *Encyclopedia of Associations* (N=19) have budgets of over $100,000 annually and the overwhelming trend among them is one of rapid growth.

46. In terms of cultural production, there are now, according to my count from *Magazines for Libraries* (6th edition, New York: R.R. Bowker) and *Ulrich's International Periodicals Directory* (32nd edition, New Providence, NJ: R.R. Bowker), 162 lesbians and gay magazines published in the United States. The ten largest of these have circulations totalling one million.

47. Again, there has been remarkable growth over the past several decades. Only one existed in the 1950s, 5 more were established in the 1960s, 69 more were established in

the 1970s, 73 more were established in the 1980s and 16 additional gay and lesbian magazines have been founded already in the 1990s.

48. The growing infrastructure for gay and lesbian concerns is reflected in the general publishing world as well. One small illustration came from a report in *Publishers Weekly* in its April 27, 1990 issue. *PW* reported that Alyson Publications of Boston had announced a new line of books written for the children of lesbian and gay parents. Said the publisher, "ten years ago it wouldn't have been feasible to start a line like this -- it would have been impossible to find the market. Now there are more stores that cater to the gay and lesbian market."

49. An infrastructure of lesbian and gay organization and activity has been firmly established on college and university campuses and in acadamia generally. In April 1991 (in the *Washington Post*), Martin Duberman, founder of the Center for Lesbian and Gay Studies at the Graduate Center of the City University of New York, described these developments as an "extraordinary flurry of activity." That activity has not abated: in 1991 the national Lesbian and Gay Studies Association was founded; there are now academic journals that focus on homosexuality (such as the *Journal of Homosexuality*); the National Gay and Lesbian Task Force lists 46 colleges and universities ("by no means exhaustive") with courses devoted to homosexuality or bi-sexuality; at many colleges and universities gay and lesbian student organizations exist and operate by student fees or from institutional funds; Columbia University Press as well as NAL Books and St. Martin's Press all have series devoted to gay/lesbian studies; there have been several annual national academic conferences devoted to gay studies held at major universities including the Ivy League (three at Yale;, [sic] one at Harvard); and the major professional associations

in the social sciences and humanities (including the American Political Science Association, the American Sociological Association, the American Historical Association, etc.) all have gay and lesbian caucuses or subcommittees to press the gay and lesbian agenda in their respective professions. These developments have quickly become part of mainstream academic inquiry. The editors of *Feminist Studies* note, for example, "the extraordinary rapid growth and acceptance of queer theory in the humanities."

50. In the public school system there has also been a dramatic opening up to the views, interests and concerns of the gay and lesbian community. As early as 1977, San Francisco public schools instituted curriculum "designed to 'sensitize' students to accept -- or at least tolerate -- homosexual lifestyles as just another way of living". Since then, the presentation of homosexuality has become common in sex education and multicultural curricula. Efforts have been underway (notably in San Francisco) to lift "homosexuality out of the closet and onto the pages of history, literature, art, math and science". According to one spokesman for the Bay Area Network of Gay and Lesbian Educators, "our intent is to raise consciousness that gay, lesbian and bi-sexual people are not included in the curriculum, and we want to see that that ends. Their contributions are an integral part of history." In New York City in 1985, the Harvey Milk School was founded. According to *Time*, it is a fully accredited high school for gays, lesbians, cross-dressers and transsexuals. It is part of the New York City *public* school matrix.

51. **Social and Economic Location:** The size, coherence and strength of a social movement or subculture is crucial for the establishment of claims, but organization by itself is not the only factor to consider. From the time of Edward Shils, social scientists have understood the

PUBLISHER'S NOTE:

Page(s) 253 missing in original.

54. Another way to gauge the social location of the gay and lesbian movement is in terms of the homosexuals [sic] position in the class structure of American society. Though gays and lesbians can be found across the spectrum -- from rich to poor; well-educated to poorly educated -- in general the available evidence consistently suggests that *on average* gays and lesbians are better educated and have higher incomes than heterosexuals.

55. According to U.S. Census data from 1990, for example, the average annual household income of male homosexuals was $56,863 and female homosexuals was $44,793. This compares to an average annual household income of $47,012 for married heterosexuals and $37,602 for unmarried heterosexuals. (Cited in *USA Today*, April 12, 1993)

56. According to the same census data, 35 percent of male homosexuals and 38 percent of the female homosexuals had a college degree compared to 18 percent of the married heterosexuals and 13 percent of the unmarried heterosexuals.

57. The patterns represented by these figures comport with the patterns found in other surveys. According to a 1992 survey of 7,500 gay men and lesbians by Overlooked Opinions, a polling firm based in Chicago, gay male households have average incomes of $51,325 and the average lesbian household income is $45,927. This compares to an average household income for all Americans of $36,520. The median years of education for gays and lesbians is 15.7 years compared to 12.7 years for the American population as a whole. According to the survey, only 10 percent of lesbian households and 3 percent of gay male households include children. This, of course, would mean that homosexuals have considerably more discretionary income than heterosexual households.

58. It is also worth noting from the survey that homosexuals are more politically active than the population as a whole: 87 percent of gay males and 82 percent of lesbians said they voted in the last presidential election compared to about 50 percent of all eligible voters nationwide.

59. A survey of the readership of eight gay newspapers in 1988, conducted by Simmons Market Research Bureau (based in New York) found the same general pattern of high education and relative affluence of the homosexual community.

60. To the extent that the findings of these surveys are accurate, self-identified gay people are clearly living and operating in the "center" rather than the "periphery" of regional and national life.

61. Let me insert a caveat here, however. No study is methodologically perfect. These studies too have particular weaknesses in sampling design that call into question the generalizability of facts and figures. Even the U.S. census is less than perfect methodologically. Certainly more careful research on the socio-demographic profile of the gay and lesbian communities is called for. But the census and surveys should not be dismissed outright. Collectively they provide a strong indication of a socio-demographic pattern. The fact that a pattern is repeated rather than contradicted in a range of surveys provides a measure of confidence that such patterns may hold -- if not in the specifics, then perhaps in the general distribution. At the very least the data reliably describes a significant sector of the self-identified gay and lesbian population, those who would most likely be engaged in collective political and social action.

62. *A Note on the Badgett Study*: In this context it is worth commenting on an analysis of General Social Survey

(GSS) data from the National Opinion Research Center by M.V. Lee Badgett, referred to by Professor Sherrill in his testimony. The report is relevant because it seems to contradict the patterns described above. Professor Sherrill described this study as "extraordinary," providing "very substantial evidence of discrimination," that "as a group in society, gay people are economically disadvantaged." In fact in his testimony, Professor Sherrill over-interprets the findings of the Badgett study: he says that the study demonstrates "that lesbians earn slightly less than heterosexual women, certainly not more." In fact, the Badgett study is inconclusive regarding the experience of discrimination among lesbians. The evidence reported only supports the contention that men who have sex with other men earn less than those who have not done so.

63. To be sure, the Badgett analysis presently is at least as flawed methodologically (though for different reasons) as those surveys Professor Sherrill rejects.

64. There are two problems inherent in the data she used. a) Since the questions concerning sexual behavior were asked of only a subsample of the respondents in each year of the GSS, Badgett had to combine the data from three separate years of the survey in order to secure a large enough sample for statistical analysis. b) The GSS only has respondents indicate a broad category within which their incomes fall. Badgett's analysis required more precise assessments of yearly earnings, so she had to reconstruct the income variable by assigning each respondent an "average" income associated with the range he or she actually reported. Both of these practices impact upon the validity of the results.

65. Another problem centers on how she measured homosexuality in her analysis. Badgett was forced to come up with her own rather innovative approach to identifying

gay men, lesbians, and bisexuals within her sample. The GSS does not ask respondents to identify their sexual orientations, but it does have them report on the number of sexual contacts they have and with members of each sex. On the basis of responses given to these questions, Badgett identified four groups of "homosexuals." This roundabout way of identifying homosexuals is problematic for several reasons. First, it labels as homosexual all those who have ever had sexual contact with a member of the same sex rather than simply focussing upon those who are self-identified or currently practicing homosexuals. In studying discrimination against homosexuals in the workplace, it would be far more effective to study just those who have made their sexual orientations known in the workplace. Badgett herself owns up to this limitation. Yet another problem with her method of identifying homosexuals is that it hinges upon the number of different sexual partners an individual has had. Thus, those who qualified as "homosexual" in her classification were also those who exhibited a certain degree of promiscuity. In light of this fact, it may be that the income differentials she finds are due more to the general effects of sexual promiscuity than to supposed patterns of discrimination against gay man [sic], lesbians and bisexuals. This latter question can be addressed but the study is so poorly documented as it is that the reproduction and extension of her analysis is impossible.

66. As it stands now, the Badgett study is, at best, an interesting and suggestive indication -- worthy of follow-up. The problem is that hers, like the others, is an analysis that would not pass the blind review process common in refereed social science journals, at least not in the state it is in now. How Professor Sherrill can call this study in its present form "extraordinary" is beyond me. It is certainly misleading to construe Badgett's study as "very substantial evidence of discrimination."

67. **Recognition and Legitimacy:** The intensity of collective action, the strength of the movement infrastructure and the social location of the individuals and organizations making up the movement are all critically important sources and manifestations of power. The relative recognition and legitimation of a group and its claims, however, is a measure of the group's indirect influence over culture.

68. Consider first the growing recognition and legitimacy of homosexuality and of gay and lesbian concerns are found in the amount of news coverage gays and lesbians receive. In the *New York Times*, for example, gay and lesbian concerns were covered 24 times a year during the 1960s. This grew to an average of 126 stories per year during the 1970s; 112 stories per year in the 1980s; and so far in the 1990s, 242 times per year on average.

69. In the *Washington Post*, gay and lesbian concerns were covered 48 times a year during the 1970s. This grew to an average 56 stories per year during the 1980s; and so far in the 1990s, 127 times per year on average.

70. So too, in an analysis of *Washington Post* editorials between 1977 and 1993 (N=61), 79 percent were favorable toward gay and lesbian concerns, 11 percent were unfavorable, and 10 percent were neutral.

71. Howard Kurtz, writing in the *Washington Post* (May 9, 1993), has characterized media coverage of homosexuality this way: "Homosexuals barely existed in the establishment press for years, or were portrayed with thinly disguised hostility, as perverts. *That has changed dramatically in the last five years as gay issues have surged to the top of the national agenda.* Now the unspoken pressure is to depict gays and lesbians sympathetically, although many Americans remain uncomfortable with open

displays of homosexuality and some of the movement's more radical elements." (Emphasis added)

72. The recognition of homosexuality and the legitimacy of gay rights have been established among various groups of elites outside of mainstream journalism as well. At a march for homosexual rights in Washington in 1987, according to the *New York Times* (October 11, 1987), "more than 1,000 elected officials, including 100 members of Congress, and other prominent civic, labor and religious leaders signed letters endorsing the march."

73. Public opinion surveys also demonstrate an increase in the legitimacy of claims made by homosexuals. To be sure, roughly three-fourths of the American population (as measured by the National Opinion Research Center data), have consistently maintained that homosexuality is "always wrong." Yet despite the consistent moral rejection of the practice of homosexuality, the majority of Americans favor certain civil liberties of homosexuals. Two-thirds (66%) in 1992 favored allowing homosexuals to teach in public schools; 71 percent favored allowing a book written by a homosexual to be kept in public libraries; and 78 percent favor allowing homosexuals to lecture in public. Civil libertarians like myself will be distressed that the numbers are not higher but the level of tolerance toward these civil liberties has consistently and clearly expanded in the past two decades (1973): up from 49 percent in the first case (teaching); up from 55 percent in the second case (library book); and up from 63 percent in the third case (public speech).

74. The trends revealed in these data are confirmed by other survey data. According to a fall, 1989 Gallup poll, 47 percent of all adults believe that homosexual relations between consenting adults should be legal. This figure increased from 33 percent in 1987. In the same poll, 71

percent of the respondents said that gays should have equal rights in job opportunities. Two years before, 59 percent opposed to equal job opportunities. Nearly 8 out of 10 (79%) said it is alright [sic] for homosexuals to be hired as salespersons (up from 71 percent in 1985 and 68 percent in 1977). Just more than half of all surveyed (56%) said that homosexuals should be hired as doctors, but again this was up from 52 percent in 1985 and 44 percent in 1977. Finally, only 42 percent thought that homosexuals should be hired as elementary school teachers, but here too this figure had increased from 36 percent in 1985 and 27 percent in 1977. (Reported in *Newsweek*, March 12, 1990)

75. The trend of increasing openness and tolerance toward homosexuals is even reinforced in the Michigan Election Survey's feeling thermometer. In 1984, the percent who rated their feelings toward homosexuals at the coldest (0) was 35 percent. In 1988 the number holding those feelings toward homosexuals decline to 30.5 and in 1992, the number decline yet again to 24 percent. The frozen tundra of "cold feelings" toward gays has clearly begun to thaw.

76. Not only do national public opinion data point to growing acceptance of the civil rights of homosexuals, but public opinion data from the residents of Colorado show this as well. A survey of Colorado citizens conducted in December, 1992 by Talmey-Drake found that 6 out of ten (59%) agreed that "homosexuals should be allowed to serve in the armed forces"; 73 percent disagreed with the statement that "homosexuals shouldn't be allowed to teach in the public schools"; 78 percent disagreed with the statement that "homosexual behavior should be against the law, even if it occurs between consenting adults"; 96 percent disagreed with the statement that "homosexuals should be required to wear an identification badge, so people who wanted to avoid associating with them would know who they are"; 72 percent disagreed that "landlords should be allowed to refuse to rent

to homosexuals"; and 68 percent agreed with the statement that "the average person is not nearly so prejudiced against homosexuals as many gay-rights activists would want people to believe."

77. Given the trends of the last two decades, there is every reason to believe that the level of recognition, legitimation and tolerance for gays and lesbians and their public concerns will continue to expand.

78. The cultural legitimation of homosexuality, or perhaps the cultural delegitimation of views hostile to homosexuality, have indeed changed dramatically. Dorothy Rabinowitz has caught the flavor of this when she observed in the *Wall Street Journal* (February 14, 1990) that "[c]ertain offenses, those of racism and homophobia in particular, now have such status that it is necessary only to be accused of them to be found guilty or at least irremediably tainted." In reference to the censuring of CBS commentator Andy Rooney for critical remarks he made about homosexuality, she said, "It needs no more than such an accusation to bring the capitulation of a large and powerful broadcast network."

79. Gay leaders themselves acknowledge the changes in recognition and legitimacy. As Tom Stoddard, executive director of the Lambda Legal Defense and Education Fund, has observed about these trends, "*The world has been genuinely transformed in two decades.* It is not possible to live in the United States and not be aware of gay people. That by itself is a revolution. (Quoted in *Newsweek*, March 12 1990, pg. 21) (Emphasis added)

80. **Summary:** Power is not a unitary or one-dimensional phenomenon. To measure power only in terms of the achievement of certain behavioral ends, or to suggest that formal political power is the only real or even relevant kind

of power to consider in a situation such as the one gays find themselves is disingenuous. Power is multidimensional, involving the mobilization of social, economic, legal and cultural resources toward a plodding realization of community commitments and ideals.

81. Power, in all of these dimensions, is also not static. This is why it is essential to understand all of these dimensions of power historically; in terms of the way they have changed over time.

82. In this light can it be said that gay and lesbians achieved all of their objectives? The answer is, obviously, no. Has their position and standing in American political, social and cultural life changed in recent decades in a manner that has at least brought them closer? Dramatically so.

83. The growth in organizational strength and presence in mainstream American society, the transformation of social and legal norms in American culture, and the increase of clout in the American political and judicial establishment is undeniable and (in my opinion) irreversible. These gains have been made not through magic nor by some natural evolutionary process but, in large part, by the sophisticated mobilization of resources based upon common interests and ideals. All of these developments outlined here, and others too, together demonstrate the spectacular growth in the public presence and power of the gay and lesbian community.

84. The view that gays and lesbians now have no political power is, in my professional judgement, not only untenable but utterly ridiculous. Such a view can only be sustained on the basis of a narrow and out-dated theoretical foundation, an ignoring of a wide range and voluminous body of empirical evidence, and a complete lack of

appreciation for the changing nature of power in history. In short, such a view is only sustainable on the basis of a weak, if not incompetent, social science.

85. Not to put too fine a point on it, such a view (that gay people are politically powerless) runs contrary to the convictions of many gay intellectual and political leaders themselves. I have quoted several sources already to this effect (in paragraphs 35, 38, 40, 48, and 79). Others concur.

86. Jonathan Rauch, for example, recently argued in *Reason*, that the victim model simply does not fit very well. "It's not true at the economic or the cultural level," he says. "Who enjoys more cultural influence in Hollywood today, gay people or fundamentalist Christians?" Elsewhere (the *New Republic* in May 1993) he wrote that the usefulness of the "standard political model [which] sees homosexuals as an oppressed minority who must fight for their liberation through political action" . . . "is drawing to a close." "[L]ife is not terrible for most gay people," he writes, "and it is becoming less terrible every year."

87. In a similar way, Andrew Sullivan, editor of the *New Republic*, has described gay people as "already prosperous, independent and on the brink of real integration".

88. Neither Rauch nor Sullivan, nor the gay leaders mentioned earlier would say that the integration of gay people into mainstream American society has been fully accomplished; that discrimination, acts of violence and civic intolerance of gays and lesbians have been fully eradicated -- not even close. But neither would these intellectuals deny the substantial and substantive changes that have occurred in the public and political fortunes of gay people.

Implications

89. Needless to say, those morally opposed to homosexuality have organized and mobilized a vast array of resources as well. It is because of the highly institutionalized and powerful mobilization of resources on both sides that this dispute is controversial and divisive. Each side perceives a threat to its own freedoms, and possibly even to its existence. Can democracy face up to this challenge?

90. At the foundation of any democratic society is the principle that the laws that order our lives together are legitimate only so long as they enjoy popular consent. Without such consent, nearly anything can happen. This is why cultural disputes are potentially the most volatile; sociologically speaking, cultural disputes provide the foundation and legitimation for violent confrontation. It is not that wide scale civil strife will occur in Colorado or in any other part of the country, but without serious and substantive argument over the core issues underlying Amendment 2, the present polarization could escalate into greater acts of hate and violence -- on both sides of this dispute. The history of the abortion controversy is testimony to just this; of what happens when debate is curtailed or shut down.

91. The question is, how and where can such consent be fashioned? The legal and political challenge is to create contexts where there is the greatest level of substantive debate among opponents so that persuasion may rule. As Andrew Sullivan (writing in the *New Republic* (May 10, 1993)), has put it,

> "however effective or comprehensive anti-discrimination laws are, they cannot reach far enough to tackle this issue; it is one

> that can only be addressed person by person, life by life, heart by heart.
>
> For those reasons, such legislation rarely touches the people most in need of it; those who live in communities where disapproval of homosexuality is so intense that the real obstacles to advancement remain impervious to the legal remedy."

92. The challenge before the court is to fashion a legal outcome that will foster the greatest level of open discussion and political will formation among the greatest number of people. The referendum procedure may or may not be the best forum for this but it is certainly one important and legitimate mechanism for generating substantive debate among a large number of people so deeply divided. Whatever the specific legal outcome, the challenge before the people of Colorado would then be to engage each other over their deepest differences as fellow citizens.

/s/
James Hunter

DEPOSITION OF JAMES HUNTER

[Dep., p. 60]

Q. Well, didn't the opponents of Amendment 2 succeed in winning the debate at the local level when they succeeded in getting municipal ordinances protecting --

A. That's right.

[Dep., p. 61]

Q. -- them against sexual orientation discrimination?

A. That's right.

Q. So you are saying that that shouldn't have been the end of the debate, that then we should take it to the state level and amend the constitution?

A. I would not have supported Amendment 2. I think that, my personal view is that the local ordinances were fine and that this represents -- at one level it's an escalation. But the tendency again in these kinds of disputes is to push them all up, and usually the process is fairly quick, where it goes right to the courts and debate is eliminated. And that's what's going on here.

* * * * *

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

ORDER

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON as Attorney General of the State of Colorado, and THE STATE OF COLORADO,

Defendants.

It has been suggested to this court that a Rule 54(b) certification is necessary under the current posture of the case. This court wishes to continue with its policy of expedition in dealing with the present case and therefore determines that there is no just reason for delay on the judgment finding Amendment 2 unconstitutional on the grounds previously stated. The ruling by this court may and

ought to be appealed without waiting for ruling on other issues raised by plaintiffs.

SO ORDERED this 9th day of February, 1994.

BY THE COURT:

/s/
H. JEFFREY BAYLESS
District Court Judge

(34)

No. 94 - 1039

FILED
APR 21 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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QUESTION PRESENTED

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
A. Proceedings Below.	4
B. Statement of Facts.	5
C. Colorado Supreme Court Opinions.	8
SUMMARY OF ARGUMENT	9
ARGUMENT	
AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.	13
A. A State's Allocation of Authority Between Political Subdivisions Should Not Be Disturbed Absent Exceptional Circumstances.	14
B. There is No Suspect or Quasi-Suspect Class Issue in this Case.	16

PAGE

C. There is No Fundamental "Right" for Every "Independently Identifiable Group" to Unfettered Participation at Every Level of Government. 18

1. This Court's Decisions in *Hunter v. Erickson* and Its Progeny Do Not Support the Fundamental Right Identified by the Colorado Supreme Court. 18

2. Amendment 2 Does Not Infringe the Right to Vote or Any Other Recognized Right Relating to Political Participation. 25

3. The "Right" Recognized by the Court Below Cannot Be Upheld Under the Accepted Constitutional Analysis Embraced by this Court. . . . 28

4. The Rationale of the Decision Below is Sweeping and its Consequences are Devastating. 34

D. Amendment 2 is Subject to, and Readily Satisfies, Rational Basis Review. 39

1. Amendment 2 Maintains the Integrity of Civil Rights Laws. 41

PAGE

2. Amendment 2 Enhances Individual Freedoms. 43

3. Amendment 2 Achieves Statewide Uniformity and Deters Factionalism. 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Howerton, 486 F. Supp. 1119 (S.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982) 36

Anderson v. Celebrezze, 460 U.S. 780 (1983) 48

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986) 25

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Beal v. Doe, 432 U.S. 438 (1977) 37

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub. nom.*, 494 U.S. 1004 (1990) 17

Bernal v. Fainter, 467 U.S. 216 (1984) 15

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 44

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 41

Bowers v. Hardwick, 478 U.S. 186 (1986) 29

CASES — PAGE

Cabell v. Chavez-Salido, 454 U.S. 432 (1982) 16

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City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 13, 17

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City of Springfield v. Kibbe, 480 U.S. 257 (1987) 18

Coyle v. Oklahoma, 221 U.S. 559 (1911) 15

Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) 32, 33, 48

Davis v. Bandemer, 478 U.S. 109 (1986) 35

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CASES — PAGE

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Gregory v. Ashcroft, 501 U.S. 452 (1991) . . 10, 15, 31, 39, 40

Griswold v. Connecticut, 381 U.S. 479 (1965) 46

Harris v. McRae, 448 U.S. 297 (1980) 37

CASES — PAGE

Heller v. Doe, 113 S. Ct. 2637 (1993) 39, 40

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990) 17

Hill v. Stone, 421 U.S. 289 (1975) 26

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 10, 16

Hunter v. Erickson, 393 U.S. 385 (1969) 8, 11, 16, 18-25, 28, 35

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James v. Valtierra, 402 U.S. 137 (1971) 11, 21-25, 30, 31

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CASES — PAGE

Karcher v. Daggett, 462 U.S. 725 (1983) 35

Korematsu v. United States, 323 U.S. 214 (1944) 17

Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 8, 11, 25, 26

Lalli v. Lalli, 439 U.S. 259 (1978) 17

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Luther v. Borden, 48 U.S. (7 How.) 1 (1849) . . . 10, 14

Maher v. Roe, 432 U.S. 464 (1977) 37

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 24, 31

McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969 (1980) 31

Meyer v. Nebraska, 262 U.S. 390 (1923) 44

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 17

CASES PAGE

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 29, 46

Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890 (2d Cir. 1980) 26

National Gay Task Force v. Board of Education, 729 F.2d 1270 (10th Cir. 1988), *aff'd mem.*, 470 U.S. 903 (1985) 17

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Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 17

Palko v. Connecticut, 302 U.S. 319 (1937) 29

Palmore v. Sidoti, 466 U.S. 429 (1984) 4

Pennell v. City of San Jose, 485 U.S. 1 (1988) 39

Prince v. Massachusetts, 321 U.S. 158 (1944) 46

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CASES PAGE

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 41

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Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) 36

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Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) 17

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Sugarman v. Dougall, 413 U.S. 634 (1973) 15

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Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) 24

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CASES **PAGE**

Vance v. Bradley, 440 U.S. 93 (1979) 12, 19, 39

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 45

Washington v. Davis, 426 U.S. 229 (1976) 21

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) 3, 9, 11, 12, 22-25, 31, 35

Williams v. Rhodes, 393 U.S. 23 (1968) 8, 26, 27

Wisconsin v. Yoder, 406 U.S. 205 (1972) 46

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 17

Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522 (1992) 18

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI 36

U.S. Const. amend. I 43

U.S. Const. amend. XIV, § 1 . . . . . 1, 3, 4, 9, 13, 19, 25, 28, 48

Colo. Const. art. II, § 10 43

CONSTITUTIONAL PROVISIONS **PAGE**

Colo. Const. art. II, § 30b 1, 2, 3

Colo. Const. art. IV, § 1 37

Colo. Const. art. V, § 3 37

Colo. Const. art. V, § 50 37

Colo. Const. art. X, § 20. 41

Colo. Const. art. XIV, § 3 37

Colo. Const. art. XX, § 1 37

Colo. Const. art. XX, § 7 37

STATUTES

28 U.S.C. § 1257 2

42 U.S.C. § 1983 4

Colo. Rev. Stat., Vol. 1A (1994 Supp.) 3

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No. 94 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR PETITIONERS

The Governor of Colorado, and the State of Colorado, through Gale A. Norton, the Attorney General of Colorado, urge this Court to reverse the decision of the Colorado Supreme Court and hold that Colo. Const. art. II, § 30b ("Amendment 2") does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinions of the Colorado Supreme Court (Pet. App. B and D) are reported at 882 P.2d 1335 (Colo. 1994) and 854 P.2d 1270 (Colo. 1993), respectively. The opinions of the trial court (Pet. App. C and E) are not reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Colorado Supreme Court was issued on October 11, 1994, and modified on November 7, 1994. The judgment of the Colorado Supreme Court (Pet. App. A) was entered on November 14, 1994. Petitioners filed the petition for certiorari on December 12, 1994. The petition was granted on February 21, 1995.

CONSTITUTIONAL PROVISIONS

Article II, § 30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the validity of a Colorado constitutional amendment, popularly known as "Amendment 2," which precludes any state or local governmental entity from adopting or enforcing any law or policy providing special protections for homosexuals and bisexuals. Pet. App. D-25.[1] The Colorado Supreme Court conclusively determined that "the immediate objective" of Amendment 2 was "to repeal existing [laws] of state and local entities that barred discrimination based on sexual orientation." Pet. App. D-24. At bottom, Amendment 2 constitutes a fundamental decision by the State's citizens concerning "a particular division of authority . . . between state and local governing bodies." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 493 (1982). The pivotal legal issue in this case is whether, as the Colorado Supreme Court held, the federal Constitution dictates a different division of authority among institutions of local government whenever the matter at issue implicates the interests of any "independently identifiable group."

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[1]The Colorado Revisor of Statutes renumbered this provision as art. II, § 30b for "ease of location." Colo. Rev. Stat., Vol. 1A (1994 Supp.).

A. Proceedings Below.

Amendment 2 was adopted at the November 1992 general election, by a vote of 813,966 in favor and 710,151 against (53.4% to 46.6%). Respondents instituted this lawsuit in a Colorado state court under 42 U.S.C. § 1983, claiming that Amendment 2 *facially* violates several provisions of the federal constitution. The trial court preliminarily enjoined Petitioners solely on legal grounds from enforcing Amendment 2 pending the outcome of a trial on the merits. Pet. App. E-18.[2]

On July 19, 1993, the Colorado Supreme Court affirmed the issuance of the preliminary injunction, albeit on different grounds. Pet. App. D. The court determined that Amendment 2 presumptively violated a "fundamental right" protected by the Equal Protection Clause of the Fourteenth Amendment, of any identifiable group to have political issues addressed at all levels of government. Consequently, the Colorado Supreme Court affirmed and remanded the matter for a trial on whether Amendment 2 is narrowly tailored to achieve a compelling state interest.

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[2]Citing *Palmore v. Sidoti*, 466 U.S. 429 (1984), the trial court concluded Amendment 2 infringed upon a so-called fundamental "right not to have the State endorse and give effect to private biases" affecting "an identifiable class." Pet. App. D-5; Pet. App. E-15 through E-17. Respondents did not defend this "right" on appeal, characterizing the trial court's ruling as "best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." Pet. App. D-6. The Colorado Supreme Court accepted Respondents' concession, and in its two opinions, never referred to *Palmore* again.

Trial was held October 12-22, 1993. In addition to whether Amendment 2 was supported by a compelling state interest, the parties also litigated whether homosexuals and bisexuals constituted a "suspect" or "quasi-suspect" class for equal protection purposes. The trial court ruled that homosexuals and bisexuals do not constitute a suspect or quasi-suspect class. Pet. App. C-18, C-19. With respect to the new "right," the court found that Amendment 2 promotes two compelling interests -- religious freedom and familial privacy. The court nonetheless held the provision unconstitutional because it is not narrowly drawn to achieve those purposes in the least restrictive manner possible. Pet. App. C-14.

On October 11, 1994, the Colorado Supreme Court affirmed, restating its earlier holding that Amendment 2 infringes upon a fundamental right of an identifiable group to participate equally in the political process, and upholding the trial court's determination that Amendment 2 was not narrowly tailored to the State's compelling interests. Pet. App. B. The supreme court expressly noted, however, the trial court's findings and conclusions rejecting Respondents' suspect or quasi-suspect class claim. Pet. App. B-6 n.3. The court further noted that Respondents had not appealed that aspect of the case, and accordingly refused to consider the issue. *Id.*

B. Statement of Facts.

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted special legal protections to homosexuals and bisexuals: three cities (Denver, Boulder, and Aspen) had sexual orientation ordinances regulating employment, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the Colorado General Assembly

extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on sexual orientation.[3]

Believing that the General Assembly and other governmental officials were not sufficiently responsive to the public on this particular issue, the sponsors of Amendment 2 decided to take the issue directly to the people. In the words of those sponsors, Amendment 2 was intended to prevent homosexuals and bisexuals from receiving a preferred status under state and local laws (J.A. 150-51).[4] Individuals would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2. Supporters of the Amendment claimed that the extension of minority status or preference laws to include sexual orientation would be

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[3]Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) (Pet. App. F). Over 204,000 copies of this analysis were distributed statewide to the voters (v. 3, pp. 65-66).

[4]The record in this case consists of nineteen volumes of pleadings and transcripts, and numerous exhibits and affidavits. Volume and page references to the main record, whether to pleadings or to transcribed testimony, are indicated by a "v." and "p." Petitioners were defendants below; Respondents were plaintiffs below. Exhibits and affidavits will be referred to as "Ex." and "Aff.," respectively.

tantamount to granting special rights, which are not enjoyed by the public at large. Indeed, as one of the civil rights experts observed,

> every civil rights provision ends up awarding special privileges. And, it does that because the property right is vested in the owner. The right to rent or dispose is one of the great and honored roots in our society. So if you redefine a class that has a right to limit your discretion in disposal and use, you have transferred the property right from the prior title holder to this class. And, that constitutes a very large privilege.

J.A. 209.

Amendment 2 faced significant opposition, including many prominent figures and organizations, such as the Governor, the Colorado Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, at least 300 Denver area religious leaders, and most of the newspapers in the State (J.A. 158-61, 173; v. 16, pp. 1044, 1050). Amendment 2's opponents outspent its supporters by a nearly 2-1 margin (J.A. 165; v. 16, p. 1046; Df. Ex. S). Even so, the people approved Amendment 2 after a spirited campaign which the trial court found to be a classic example of democratic self-government:

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment,

and that involved spending money and presenting their views.

> There was absolutely nothing wrong with that. As a matter of fact, this is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process because they have followed exactly what democracy urges.

Pet. App. E-10.

C. Colorado Supreme Court Opinions.

The cornerstone of the Colorado Supreme Court's first opinion in this case was its conclusion that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." Pet. App. D-14. According to the majority, this concept found its "most explicit, and nuanced, articulation" in *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny. Pet. App. D-14.[5] Interpreting *Hunter* as not limited to "special burdens on racial minorities within the governmental process," the court below found that

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[5]The Colorado Supreme Court found that this concept was also the "common thread which unites" this Court's cases concerning preconditions on the right to vote (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969)), reapportionment (*e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964)), and candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968)); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). Pet. App. D-13 through D-14.

Amendment 2 infringed upon a "fundamental right to participate equally in the political process" because homosexuals and bisexuals were no longer "free to appeal to state and local government for protection against discrimination based upon their sexual orientation . . . ." Pet. App. D-14, D-25 and D-27.

In its second opinion, the Colorado Supreme Court reaffirmed its core holding, addressed the various governmental interests asserted by the State, and held that Amendment 2 is unconstitutional under strict judicial scrutiny. Pet. App. B-7 through B-22.

Justice William H. Erickson dissented in both appeals because the majority had blurred "fundamental rights" cases with "suspect class" cases, and selectively used language from each, to create a heretofore unknown federally-mandated group-based fundamental right. Pet. App. B-37; Pet. App. D-42 through D-43. Justice Erickson found that this Court's decisions, as well as the analysis of constitutional scholars, refute the existence of any such fundamental right. Rather, he said, this Court's cases support strict-scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. D-55. In Justice Erickson's view, the appropriate standard of review under the Equal Protection Clause is the rational basis test, and Amendment 2 easily satisfies this test. Pet. App. B-46 through B-53.

SUMMARY OF ARGUMENT

The question in this case is even more "extraordinary" than the one in *Washington v. Seattle School Dist. No. 1*, 458 U.S. at 459. Here, local governments and individual citizens seek to use the Fourteenth Amendment not to protect a racial minority, but to immunize from preemption special

protections that have been conferred upon homosexuals and bisexuals.

The Colorado Supreme Court has created out of whole cloth a new fundamental "group right" not to be "fenced out" from unfettered political participation at all levels of government. This theory embodies a revolutionary change in the structure of state and local political authority, subverting the rule this Court has followed for almost 150 years that "the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849). *See also Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991). The reasoning of the court below does profound violence to settled understandings of the authority of, and respect for, popular government at the state level. It does so without the remotest support in any prior decision of this Court. Applying either general equal protection analysis or fundamental rights analysis, the decision below should be reversed.

A.

The intent and effect of Amendment 2 is to withdraw a deeply divisive social and political issue from elected representatives and place its resolution squarely in the hands of the people. Core principles of federalism have led this Court to grant States "extraordinarily wide latitude," *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978), in such internal allocations of authority among political institutions. Rare in any context, heightened scrutiny is almost never appropriate where, as here, the challenged state action goes to the heart of state sovereignty. Thus, on its face, Amendment 2 carries with it a strong presumption of constitutionality.

B.

This Court's decisions recognize one clear exception to the rule that state allocations of decisionmaking power are presumed constitutional, *viz.*, when the state action constitutes a "meaningful and unjustified official distinction[] based on race." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Seattle School Dist.*, 458 U.S. at 470. However, any claim that Respondents should be accorded the same "suspect class" treatment as racial minorities has been strategically waived by Respondents both in the Colorado Supreme Court and in this Court.

C.

Because federal judicial interference with sensitive and core political choices involves an extraordinary departure from the traditional approach demanded by our federalist system, this Court has steadfastly refused to extend *Hunter* beyond the context of racial minorities. *James v. Valtierra*, 402 U.S. 137, 141 (1971). This Court should follow that course in this case.

The new fundamental "group right" recognized below finds no support in any previous decision of this Court, and certainly not in the voting cases relied upon by the lower court. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Nothing in Amendment 2 deprives anyone of a right to vote, or to have access to the ballot, or to petition government or to exercise any other fundamental right. Amendment 2 merely reserves to the people the *issue* of special protections for homosexuals and bisexuals. Thus, the voting cases on which the court below relied support the constitutionality of

Amendment 2, which is itself the product of a popular vote. Respondents retain complete freedom to employ the same democratic processes that led to Amendment 2, to reallocate power in the future in ways that they regard as more appropriate.

Furthermore, it is simply impossible, under this Court's equal protection jurisprudence, to characterize an independently identifiable group's ability to define the agendas of all levels of government as a "fundamental right." In fact, this Nation's history and traditions authoritatively preclude any such conclusion. *Seattle School Dist.*, 458 U.S. at 480 n.23. Finally, the "identifiable group-political participation" theory adopted by the Colorado Supreme Court, if upheld, would cast constitutional doubt on a wide range of state and federal legislation, because the definition embraces virtually every conceivable group. No persuasive rationale has been offered by the court below or Respondents to support this proposed sea change in the law.

D.

Amendment 2 is properly subject to rational basis scrutiny and readily satisfies that standard. This Court has held that it "will not overturn . . . a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Amendment 2 unquestionably is rationally related to a number of legitimate state interests, including three which the lower courts found so convincing as to be "compelling" (albeit, not narrowly tailored).

The interests advanced by Amendment 2 fall into three general categories. *First*, given limited resources, the people of Colorado plainly could conclude that anti-discrimination protections should be reserved for those who are particularly deserving of special protection. *Second*, eliminating anti-discrimination provisions that compel landowners and religious institutions to open their facilities to homosexuals and bisexuals is a rational means of protecting the legitimate prevailing preferences of the State's population. Moreover, eliminating the regulatory burdens on privacy and associational interests embodied in the local laws that Amendment 2 preempted, furthers the rational basis which has variously been described as "that government is best which governs least." *Finally*, a single uniform rule has inherent advantages for efficient law enforcement. Eliminating divergent legal standards is certainly a legitimate choice that also eliminates the city-by-city and county-by-county political battles that prevailed prior to Amendment 2. In sum, Amendment 2 is a rational means of implementing legitimate governmental goals and as such it is plainly constitutional.

ARGUMENT

AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. This general rule of deference gives way only in those rare

instances when statutes either utilize "suspect" or "quasi-suspect" classifications, or infringe upon fundamental constitutional rights. *Id.* at 440-41. And where, as here, the challenged decision is a State allocation of authority among political subdivisions, this Court has recognized that intrusive heightened scrutiny is almost never appropriate.

No suspect class, quasi-suspect class, or fundamental right is implicated here. Nor can the new "right" recognized by the court below be upheld under any accepted method of constitutional analysis. To the contrary, affirmance would work a revolution in this Court's equal protection jurisprudence, and would deeply undermine traditional self-government.

A. A State's Allocation of Authority Between Political Subdivisions Should Not Be Disturbed Absent Exceptional Circumstances.

Through Amendment 2, a majority of Colorado citizens rationally chose to withdraw consideration of the question of special legal protections for a concededly non-suspect class from their state and local governmental bodies. It placed this issue exclusively in the hands of the people, preserving Respondents' rights to employ the same electoral process to overturn Amendment 2, if they persuade their fellow citizens that such a course would be more appropriate. The decision below is nothing less than a direct attack on the way the people of Colorado have chosen to govern themselves, through allocating power between themselves and their elected representatives -- a matter that indisputably goes to the heart of state sovereignty. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) at 47 ("the sovereignty in every State resides in the people of the State, and . . . they may alter

and change their form of government at their own pleasure").

Of course, "[q]uestions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). There is no area in which the presumption of constitutionality finds stronger support than a State's discharge of its "constitutional responsibility for the establishment and operation of its own government . . . ." *Gregory v. Ashcroft*, 501 U.S. at 462; *cf. Coyle v. Oklahoma*, 221 U.S. 559 (1911). Thus, this Court has consistently recognized that equal protection "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. at 469 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)).[6]

These bedrock principles of federalism demand that this Court accord States "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring

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[6]Indeed, the "unique nature of state decisions that go to the heart of representative government," *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), has led this Court to recognize that even suspect or quasi-suspect classifications may not trigger heightened scrutiny if those classifications are "closely bound up with the formulation and implementation of self-government." *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (upholding state provision denying top government posts to non-citizens and noting, "[t]he rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government").

authority upon them" or in withdrawing authority from them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This is in accord with the long-standing rule observed by this Court that:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. The State, therefore, at its pleasure may modify or withdraw all such powers, . . . conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects the State is supreme, and its legislative body conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

"Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it," *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982), and Respondents therefore bear an especially heavy burden in urging this Court to create new "fundamental rights" that would justify heightened scrutiny of a wide range of decisions at the heart of state sovereignty.

B. There is No Suspect or Quasi-Suspect Class Issue in this Case.

Both the Colorado Supreme Court and Respondents expressly recognize that this is not a "suspect" or "quasi-suspect" class case. This Court has held that only five

classifications are entitled to heightened scrutiny,[7] and has been reluctant to extend that scrutiny to additional classifications. *See Cleburne*, 473 U.S. at 441. Indeed, despite numerous invitations, this Court has declined to do so for over seventeen years. This Court has no occasion to consider that question here: as Respondents themselves admit, after an extensive trial, the trial court rejected their claim that they qualified for suspect or quasi-suspect class protection,[8] and they did not appeal that ruling. Opp. at 14; *see also* Pet. App. B-6 n.3.

Indeed, Respondents not only chose for strategic reasons not to preserve the issue in proceedings below, but also, in urging this Court to deny certiorari, they expressly relied

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[7]*Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race, suspect class); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin, suspect class); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage, suspect class); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

[8]Every federal appellate court which has considered this question has similarly rejected this claim. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub. nom.*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1273 (10th Cir. 1988), *aff'd mem.*, 470 U.S. 903 (1985).

upon that choice as a reason for denying the petition. Opp. at 14; *see, e.g., City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (dismissing writ as improvidently granted where argument was neither briefed nor argued to the court of appeals nor raised at the petition stage); *Yee v. City of Escondido*, 503 U.S. 519, ___, 112 S. Ct. 1522, 1533 (1992) (Court considers questions not raised at the petition stage only in "the most exceptional cases").

Here, then, the issue is simply whether Amendment 2 infringes upon a heretofore unknown federally-guaranteed fundamental right. As the Colorado Supreme Court admitted, this "right" is not directly attributable to any case or set of cases decided by this Court, but rather to a "principle" intuited from four separate, distinct lines of authority. Pet. App. D-13 through D-14. For the reasons that follow, none of those lines of authority -- either separately or together -- supports the extraordinary group right utilized by the court below to strike down Amendment 2.

C. There is No Fundamental "Right" for Every "Independently Identifiable Group" to Unfettered Participation at Every Level of Government.

1. This Court's Decisions in *Hunter v. Erickson* and Its Progeny Do Not Support the Fundamental Right Identified by the Colorado Supreme Court.

Our system of government presumes that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Vance v. Bradley, 440 U.S. at 97.[9] Except where otherwise required by the Constitution, "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 33 (public education not a fundamental right).

The "right" of every independently identifiable group to participate fully in all phases of the political process identified by the Colorado Supreme Court has no basis in the text of the Constitution. Nor, as the court below acknowledged, has this Court ever recognized any such "right." Indeed, if anything, this Court has repeatedly rejected it, as evidenced by the line of cases commencing with *Hunter v. Erickson*, upon which the court below so heavily relied. Under *Hunter* and its progeny, the Equal Protection Clause only prohibits efforts to realign the political process in a manner designed to harm a racial minority. Inexplicably, the Colorado Supreme Court invoked this same line of cases to reach the exact opposite conclusion.

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[9]As Thomas Jefferson once noted:

> [T]he will of the majority, the Natural law of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived. -- Let us then, my dear friends, forever bow down to the general reason of the society. We are safe with that, even in its deviations, for it soon turns again to the right way.

N.E. Cunningham, *In Pursuit of Reason* 133-34 (1987).

In *Hunter*, this Court reviewed an amendment to a city charter that repealed a racial anti-discrimination ordinance, and required voter approval before such an ordinance could be put into effect. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," this Court observed:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect" and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

393 U.S. at 391-92 (citations omitted).

Notwithstanding the facial clarity of this Court's holding, the Colorado Supreme Court reasoned that the "complexity" of the *Hunter* opinion indicated that the decision could not be based solely on race. Thus, the court below concluded that a general right to participate politically must have been a central element of this Court's holding. The Colorado Supreme Court's interpretation turns the opinion in *Hunter* on its head.[10] The difficult analysis in *Hunter* was not the concern for political participation, but instead was the problem of determining whether *Hunter* was a racial minority case. If political participation had been the

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[10]*See* R. Duncan & G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of L., Ethics & Pub. Pol. 93, 119 (1995) (dismissing this argument as "uncommonly trivial" because it "overlooks the fact that *Hunter* does not cease to be a 'race' case simply because it is not an easy case. . . . *Hunter* is a complex and difficult racial classification case").

linchpin of the analysis, it would have been wholly unnecessary to decide the much more difficult issue whether the facially neutral city ordinance constituted a "meaningful and unjustified official distinction[] based on race." 393 U.S. at 391. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). And this Court's comprehensive analysis of that issue demonstrates plainly that race was the determinative factor in the case.[11]

Two years later, this Court unequivocally refused to extend *Hunter* to non-suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional provision prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental

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[11]The *only* support in *Hunter* for the decision below is the isolated comment of this Court that a "State may [not] disadvantage any particular group by making it more difficult to enact legislation on its behalf . . . ." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). To be sure, this single reference does not explicitly mention race or any other suspect class, but it cannot be read outside of the Court's overall analysis of race in that opinion. Moreover, any doubt about the sweep of that statement should have been eliminated when it was not applied in *James v. Valtierra*. At the end of the day, this one line in *Hunter* simply cannot bear the weight the court below and Respondents would place on it.

authorities. This Court disagreed, finding that, unlike in *Hunter*,

> it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.* [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that "disadvantages" a particular group does not always deny equal protection.

Id. at 141-42 (emphasis supplied).

In its initial opinion, the Colorado Supreme Court rewrote *James* by characterizing it as "best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." Pet. App. D-20 through D-21 n.21. That characterization is mystifying. *Hunter* did not apply to the poor, because poverty is not a suspect classification, much less a racial classification. That reasoning should control this case as well.

In *Seattle School Dist.*, this Court again reaffirmed race as the touchstone for the *Hunter* doctrine. There this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools. This Court confirmed that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates

governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. 458 U.S. at 470 (emphasis in original). Indeed, as the majority noted, the core rationale of this line of cases is:

> when the State's allocation of power places unusual burdens on the ability of *racial* groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 486 (emphasis supplied) (citations omitted).[12]

Thus, *Hunter*, *James*, and *Seattle School Dist.*[13] call

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[12]That race was the controlling factor in the decision is underscored by this Court's repeated emphasis on the racial nature of the classification at issue. *E.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470-71, 474, 485-86 (1982).

[13]The Colorado Supreme Court also claimed support for its reading of *Hunter* in *Gordon v. Lance*, 403 U.S. 1 (1971). *See* Pet. App. D-19 through D-22. This heavy reliance upon *Gordon* is puzzling. There, this Court rejected *both* approaches employed by the court below -- extending the *Hunter* doctrine beyond racial classifications, and expanding the ballot access cases to state actions that merely

for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School Dist.*, 458 U.S. at 486; *see also James*, 402 U.S. at 141-42. The case is, therefore, this simple: the *Hunter* rule comes into play *only* to protect racial minorities -- or at its most expansive, members of a suspect class.[14] Thus, *Hunter* provides no support for the holding below.[15]

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make it more difficult for some kinds of governmental actions to be taken. Instead, this Court affirmed a single issue supermajoritarian vote requirement. That holding thus provides significant support for Amendment 2, not for the holding below.

[14]*See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (cited in *Seattle School Dist.*; "political powerlessness" phrase used to describe suspect class); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (same; also, correlating the "discrete and insular minorities" language of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) to the concept of "suspect" class).

[15]Professor Tribe's comprehensive analysis also recognizes that *Hunter* and *Seattle School Dist.* concern discrimination against "discrete and insular minorities," rather than "rights of political participation." *Compare* ch. 13 ("Rights of Political Participation"), *with* ch. 16 ("The Model of Equal Protection.") L. Tribe, *American Constitutional Law* (2d ed. 1988). *Accord Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain

2. Amendment 2 Does Not Infringe the Right to Vote or Any Other Recognized Right Relating to Political Participation.

The Colorado Supreme Court also claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Those cases concern the fundamental right to vote, not the "identifiable group right to political participation" intuited by the court below. *Reynolds v. Sims*, for example, stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. And *Kramer v. Union Free School Dist.*

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antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *James*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991) ("*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). *See also* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (*Hunter* doctrine limited to state action embodying a racial classification).

held only that the right to vote may not be voided on the basis of whether one is a property owner or a parent.

At root, these voting cases involve the process of electing representatives. They do not concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. *See, e.g., Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes"). And Amendment 2 does not present a case where homosexuals and bisexuals have been denied the right to vote in upcoming elections,[16] or where reapportionment or other state action has diluted the value of their individual votes.[17]

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). Those cases are likewise wholly inapposite. In *Williams*, this Court held that a complex state statutory scheme violated the rights to vote and to associate, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court

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[16]*Compare Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

[17]*Compare Reynolds v. Sims*, 377 U.S. 533 (1964).

reviewed a scheme that placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and to associate. Neither case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to protect the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot -- including the initiative process through which Amendment 2 was adopted -- as all other Colorado citizens. Rather than burdening any person's rights to vote or associate, Amendment 2 simply raises a certain issue to a constitutional level. Neither the fundamental right to vote, nor the right to petition government, encompasses a right to require the state legislature or a local government to entertain matters that are beyond its authority to address. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979). *See also* Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986).[18]

Respondents continue to have precisely the same rights as *anyone else* who has lost an election. They may continue to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in those processes. Thus, to the extent they are relevant at all,

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[18]If the Colorado Supreme Court is correct that Respondents have this broad right, then laws restricting marriage, certain tax benefits, and military service to heterosexuals are also constitutionally suspect on this ground.

the voting cases support the validity of Amendment 2, which came about as the result of a statewide vote. The right to vote can be infringed just as effectively by nullifying votes as by preventing them from being cast in the first place.

It is quite apparent, then, that the "'precondition,' 'reapportionment,' and 'candidate eligibility' cases are not dispositive of, or directly controlling on," the case at bar. Pet. App. D-13. It is further apparent that the *Hunter* doctrine is not the "principle [which] unifies these cases, despite the different factual and legal circumstances presented in each of them." *Id.* at D-14. The cases that actually provide a unifying principle governing this case are those that hold that, absent a clearly applicable constitutional impediment, States are completely free to structure their governmental decisionmaking authority without judicial interference. Colorado's Amendment 2 fits squarely within that principle and therefore should be upheld because it rationally serves legitimate governmental purposes.

3. The "Right" Recognized by the Court Below Cannot Be Upheld Under the Accepted Constitutional Analysis Embraced by this Court.

The group "right" to political participation identified by the court below as fundamental is also wholly inconsistent with this Court's accepted methodology for identifying fundamental rights. At the outset, the decision below is fatally flawed because it blurs and attempts to fuse fundamental rights and equal protection jurisprudence into a new "substantive equal protection." The Equal Protection Clause serves as a mechanism for balancing competing constitutional interests. Where a suspect classification or fundamental right is present, the balance usually tips in favor of the individual. However, the Clause is not, itself, a source of

fundamental rights; such rights must be found elsewhere in the Constitution.

Fundamental rights are those "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). Such rights have also been characterized as "deeply rooted in this Nation's history and tradition." *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The utility of these approaches

> lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . . and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 747 (1986) (White, J., dissenting) (citation omitted). *See Bowers v. Hardwick*, 478 U.S. at 192-94 (applying traditions and consensus tests).[19]

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[19]"The danger of expanding rights is clear: expansions of 'rights' essentially remove power from the democratic process and thereby limit the capacity of self-government. It would be possible to expand rights so far that self-government itself would become a meaningless concept. This danger is particularly acute when judges are asked to invent new rights, not in accord with American history and tradition, and impose them on a culturally divided nation by

The "right" to demand preferential treatment from *any* level of state or local government is neither "deeply rooted in this Nation's history and tradition," nor "implicit in the concept of ordered liberty." Quite to the contrary, this "right" represents a radical departure from our democratic traditions, and the resulting political chaos is the antithesis of any notion of ordered liberty. "The fabric of American empire ought to rest on the solid basis of *the consent of the people*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." *The Federalist, No. 22* (A. Hamilton) (emphasis in original).

The people may legitimately give their consent to their government either through elected representatives, or through direct participation. "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to veto power, over enactments of representative bodies. This practice is designed to 'give citizens a voice on questions of public policy.'" *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976) (quoting *James v. Valtierra*, 402 U.S. at 141). Indeed, in every State, the people themselves retain the power to approve or disapprove amendments to their respective constitutions,[20] and "[p]rovisions for referendums

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reading them into the Constitution." D.M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1100 (1991).

[20]Council of State Governments, *The Book of the States* at 42-43 (1990).

demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. at 141.[21]

Even a referendum that "disadvantages" a particular group is presumptively valid, unless it targets a suspect class. *Id.* at 141-42. Indeed, as recently as 1991, this Court in *Gregory v. Ashcroft* evaluated a State's mandatory retirement scheme for judges under the rational basis test, despite the obvious fact the scheme discriminated against a group -- the elderly -- which has been, and still is, the subject of discrimination. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

As was the case in *Gregory*, the people retain the right to decree that these decisions may be made only at the highest level: the state constitution. There simply is no "vested constitutional right to local decisionmaking," *Seattle School Dist.*, 458 U.S. at 480 n.23; for this reason, Colorado, like other States,

> permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent

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[21]*Cf. Grant v. Meyer*, 828 F.2d 1446, 1455 n.14 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) (quoting *McKee v. City of Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980) (The initiative is "a fundamental right at the very core of our republican form of government."))

> unfairness in this and certainly no constitutional violation.

Seattle School Dist., 458 U.S. at 496 (Powell, J., dissenting).[22]

Rather than permitting the range of issues associated with homosexuality to be widely debated and determined through the political process, however, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of political debate. Its decision slashes across core constitutional values of state sovereignty and self-government, making any distinction made by government in the establishment of its political structure vulnerable to constitutional attack. It is indisputable that under this Court's well-settled precedent the Colorado General Assembly was constitutionally free not to pass laws giving homosexuals and bisexuals protected status, to repeal any such previously enacted laws, and to refuse to pass any similar laws in the future. *See Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982).

In *Crawford*, this Court upheld a California constitutional amendment prohibiting state courts from ordering race-based public school student assignments, unless required under the federal Constitution. "[H]aving gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally

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[22]*See also Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) ("When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.")

throughout the United States." *Id.* at 542. However, under the reasoning of the Colorado Supreme Court, the California provision "fenced out" an "identifiable group" -- in that case, a *suspect class* -- from the ordinary political process. Nonetheless, this Court upheld the measure 8-1, noting that "We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and its ability to experiment. This interpretation has no support in the decisions of this Court." *Id.* at 535. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Crawford controls this case. Through Amendment 2, Colorado has simply defined the package of civil rights available to homosexuals and bisexuals under the Colorado Constitution as no larger than that provided by the Constitution and laws of the United States. The only difference between the two cases is that *Crawford* dealt with a suspect classification, and this case does not.

Achieving this same result through the people themselves, rather than their representatives, can hardly be suspect; indeed, it cannot be seriously maintained that the people have *less* power than their elected representatives. Rather, the cornerstone of our constitutional system is that the people are the source of all governmental authority, and retain the power to control their representatives:

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere over the other. Truth, no less than decency, requires that the event in every case

should be supposed to depend on the sentiments and sanction of their common constituents.

The Federalist, No. 46 (J. Madison). Surely, the traditions of this country, and concepts of ordered liberty do not mandate that representatives must be masters of their constituents.

4. The Rationale of the Decision Below is Sweeping and its Consequences are Devastating.

The "right" identified by the Colorado Supreme Court extends to all identifiable groups, and is effectively unqualified. If, as Respondents and the courts below concede, sexual orientation is not a suspect classification, there plainly is no principled way to limit the scope of the group "right" recognized by the Colorado Supreme Court. Accordingly, that "right" can be used to attack a wide range of routine federal and state legislation.[23]

What makes this result breathtaking is the impossibility of confining in any meaningful way the concept of "independently identifiable groups" which are entitled to heightened judicial scrutiny when they challenge adverse legislative

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[23]"The potential scope of the right recognized by the Colorado court in *Evans* [*v. Romer*] is breathtaking. If the court means what it says, it has discovered a constitutional right of any 'independently identifiable class of persons' to have its political agenda insulated against the constitutional rights of others." R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of Law, Ethics & Pub. Pol'y at 116.

action. Any conceivable group, from a boy scout troop to a group of tax protestors, fits the definition.

Furthermore, the *Hunter* doctrine that Respondents seek to extend beyond the suspect class context, makes no distinction regarding constitutional provisions, and applies with equal vigor to statutes, ordinances, and any other governmental action. *See Hunter v. Erickson* (voter-initiated charter amendment); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1241 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) (same); *Seattle School Dist.* (voter-initiated statute); and *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971) (statute passed by state legislature).

Consequently, extending the *Hunter* doctrine to non-racial classifications calls into question every federal and state measure that draws a distinction between different groups of people -- and there are few measures that do not draw such distinctions. Although superficially appealing, "identifiable group" analysis quickly becomes a morass, as beliefs and conduct become blurred with immutable characteristics. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("identifiable group" is one "that possesses distinctive interests and tends to vote on the basis of those interests," including "political, religious, ethnic, racial, occupational, and socioeconomic groups"); *Karcher v. Daggett*, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.")

A vast array of federal tax, regulatory, and social legislation affects groups that are "independently identifiable" based upon income, occupation, residence, health, age, or any number of other factors. State laws that might provide greater benefits or protections to any of these groups are preempted if they conflict with the purposes of federal legislation. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such instance of preemption may violate the equal protection rights of the affected group to seek additional benefits at the state or local level.

Moreover, Colorado, like other States, through tax, safety, environmental, and other legislation, routinely makes distinctions between, and imposes burdens on, "identifiable groups" on the basis of income, occupation, property ownership, residency -- even sexual orientation.[24] The Colorado Constitution, likewise, burdens "identifiable groups" that desire public abortion funding, the re-election of incumbent officials, the reorganization of certain school districts, and certain municipal annexations. If homosexuals and bisexuals are "fenced out" by Amendment 2's prohibition of special protections, then surely those who favor public funding for

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[24]For example, courts have typically upheld statutes refusing to recognize same-sex marriages under a rational basis test. *E.g.*, *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1194 (1974). *Accord Adams v. Howerton*, 486 F. Supp. 1119 (S.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *In re Estate of Cooper*, 149 Misc.2d 282, 564 N.Y.S.2d 684, 687 (N.Y. Surr. Ct. 1990), *aff'd*, 187 App. Div. 128, 592 N.Y.S.2d 797, *appeal dismissed*, 82 N.Y.2d 801, 604 N.Y.S.2d 558, 624 N.E.2d 696 (1993); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

the fundamental right to an abortion are "fenced out" by the restrictions of Colo. Const. art. V, § 50; advocates for any other medical procedure must seek only a statute.[25] Those who favor the reelection of incumbent state officials are "fenced out" by Colo. Const. art. IV, § 1; Colo. Const. art. V, § 3. Certainly, the many parents who do not want their children included in the Denver Public Schools would believe they are "fenced out" by Colo. Const. art. XX, § 7; residents of any other school district may divide or reorganize their district by obtaining a statute. The citizens of the City and County of Denver are "fenced out" from annexing property in the same manner as citizens in other municipalities by Colo. Const. art. XX, § 1 and art. XIV, § 3.

In truth, any distinction made by government in the establishment of its political structure would be vulnerable to constitutional attack under the lower court's theory. Under the Colorado Supreme Court's ruling, any individual voter whose cause is unsuccessful in a referendum would be entitled to overturn that referendum, simply because the majority imposed its will on a minority concern. Major public policy issues could never be decisively settled through the political process; government would be obliged continually to reconsider every policy choice. *See* Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 428 (1985) ("Taken to its logical extreme, then, the equal protection clause could

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[25]Such provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

establish a tyranny of the *minority*, or, worse, the *courts*, over the will of the people.") (emphases in original).[26]

The principle adopted by the court below is also incoherent because it leads to equally valid constitutional claims on both sides of every political issue. For example, under the decision below, a state constitutional amendment preempting local ordinances that allow public cigarette smoking would violate the constitutional right of smokers, an independently identifiable group, to have their cause determined at the local level. The theory adopted below, however, would give rise to a competing and *equally valid* claim on the other side -- the right of non-smokers to have their interests decided at the state level. Indeed, neither the court below nor Respondents have any principled explanation for why the *supporters* of Amendment 2 do not have an equally compelling right to have *their* interests determined at the state level.

Only the clearest constitutional justification could support such revolutionizing of traditional methods of government. The desire of interest groups to be free of measures designed to place ultimate policy decisions in the hands of the people simply cannot justify shifting away from a presumption of constitutionality in favor of intrusive heightened judicial scrutiny.

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[26]"Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left." A. Lincoln, *First Inaugural Address* (Mar. 4, 1861).

D. Amendment 2 is Subject to, and Readily Satisfies, Rational Basis Review.

Because Amendment 2 does not infringe upon any fundamental right, its validity depends solely on whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993). Under the rational basis test, this Court:

> will not overturn . . . a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. at 97. *Accord Gregory v. Ashcroft*, 501 U.S. at 470-71 (applying rational basis test to state constitutional provision). In applying this test, this Court asks only whether there is any reasonably conceivable state of facts that provide a rational basis for the classification. *Heller*, 113 S. Ct. at 2642. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 2643. Rather, "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Id.* *Accord Gregory v. Ashcroft*, 501 U.S. at 470-71; *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

The rational basis inquiry in this case does not depend upon mere theory, however, because the State argued, and presented convincing evidence, that in removing or preventing governmental regulation in this area, Amendment 2 promotes freedom of choice (relating to matters of

personal and familial privacy, religion, and association), furthers several legitimate societal concerns (relating to the integrity of civil rights laws and the contours of social and moral norms), and achieves statewide uniformity.

Significantly, neither the trial court nor the Colorado Supreme Court found any of these purposes to be illegitimate or unreasonable. Indeed, between them, the two courts recognized that there are three "compelling" public purposes served -- albeit inexactly -- by Amendment 2. Those interests were the promotion of religious freedom, the promotion of familial privacy, and the preservation of associational privacy. Pet. App. B-11 and B-13; Pet. App. C-14. Because the means need not be narrowly tailored to achieve these ends under the rational basis test,[27] these interests would, *a fortiori*, satisfy that test.

Given the nature of the rational relationship standard, many other rational justifications undoubtedly could be established. No useful purpose would be served in attempting to canvass exhaustively the field of legitimate objectives.

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[27]Indeed, under that test, courts must "accept a legislature's generalization even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.'" *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993). *Accord Gregory v. Ashcroft*, 501 U.S. at 471 (upholding state constitutional provision requiring judges to retire at age 70) ("It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all.")

Instead, the State demonstrated below that the interests identified plainly satisfy the rational basis standard.

1. Amendment 2 Maintains the Integrity of Civil Rights Laws.

The supporters of Amendment 2 were acutely aware that laws and policies designed to benefit homosexuals and bisexuals could have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. *See An Analysis of 1992 Ballot Proposals*, Pet. App. F-8. Owing to the state constitutional fiscal constraints which are necessarily a part of public administration,[28] unlimited resources are not available to combat discrimination. Therefore, it is incumbent upon the State to set priorities for its enforcement efforts. Amendment 2 is an appropriate means by which the people sought to focus government's limited resources upon those circumstances most warranting attention. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (remedying specific instances of racial or sexual discrimination is a compelling interest); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same).

When Amendment 2 was proposed, the Colorado Civil Rights Commission had voted to recommend to the General Assembly that it add sexual orientation protections to the State's civil rights statutes. This recommendation was made, despite the fact that the Commission's investigative arm, the Colorado Civil Rights Division, had experienced steadily increasing demands upon a shrinking budget, and the existence of substantial evidence that homosexuals and bisexuals were not, as a class, in need of such protections

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[28]*Cf.* Colo. Const. art. X, § 20.

(v. 9, p. 19; v. 15, p. 866; v. 16, pp. 1085-91, 1096-97; v. 17, pp. 1155, 1173).

Here, the State -- like Congress (J.A. 204) -- could legitimately determine that special protections for suspect and other needy classes should not give way to demands for inclusion of a politically powerful[29] and relatively privileged[30] special interest group. Indeed, three former

[29]The spending and voting patterns associated with Amendment 2 itself amply demonstrate that homosexuals are politically powerful. To date, activists have been successful not only in effecting the repeal of sodomy statutes in 27 States (v. 17, pp. 1254-55), but also in securing special protections in jurisdictions comprising over one quarter of our Nation's population. (v. 14, pp. 649, 652). And, among other things, through one of the country's largest political action committees, they have persuaded Congress to list sexual orientation in the federal hate crimes statute. (v. 16, pp. 907, 933; v. 17, pp. 1253, 1255, 1257).

[30]Respondents' own witness conceded that "with respect to the people who are so identified, it looks like gays, lesbians, and bisexuals continue to be more affluent than the average" and "[t]end to have higher levels of education." (v. 19, pp. 1414-15). Indeed, as one pro-gay rights article put it "gay men and lesbians suffer no discernible communal economic deprivation and already operate at the highest levels of society: in the boardroom, the media, the military, the law, and industry." Df. Aff. 6 (Barry Gross) at 26 (v. 18, p. 1341; v. 19, pp. 1349-51). This was in accord with the extensive evidence presented by Petitioners. *See, e.g.*, v. 16, pp. 920, 932; v. 17, p. 1155; Df. Aff. 9 (James Hunter) at 9-10 (J.A. 254-55; v. 18, p. 1341; v. 19, pp. 1349-51); Df. Exs. V (Simmons Market Survey) (v. 16, pp. 908-09), EEE (USA Today Analysis of U.S. Census Bureau

Chairmen of the Colorado Civil Rights Commission strenuously opposed the inclusion of homosexuals under the ambit of the civil rights statute (v. 15, p. 867); one said that such action represented "a drastic departure" from the historical aims of the civil rights laws (v. 17, p. 1156).[31]

2. Amendment 2 Enhances Individual Freedoms.

Another obvious interest served by Amendment 2 is that it enhances individual freedom by eliminating governmental interference in the choices people make in religious, familial, personal, and associational matters. Both the United States Constitution and the Colorado Constitution explicitly recognize the importance of religious liberty, U.S. Const. amend. I, Colo. Const. art. II, § 10, and this Court has recognized

data) (v. 16, p. 924), MMM (Overlooked Opinions, Inc. Survey) (v. 16, p. 924).

[31]Indeed, part of the Amendment 2 debate was whether granting protected class status would lead to affirmative action for homosexuals and bisexuals. (J.A. 172, 202; v. 16, pp. 982, 1057-59). In San Francisco, for example, the mayor "promised to represent 20 percent of his administration in city government with homosexuals" (v. 16, p. 1057), and an affirmative action plan for homosexuals has since been considered in the City and County of Denver. *See Denver Will Recruit Homosexual Cops*, Rocky Mountain News, Mar. 24, 1994, at 4A. *See also* J.S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 Yale L. & Policy Rev. 47 (1993); Pl. Ex. 117 (City of Aurora rule on equal opportunity and affirmative action) (J.A. 94, v. 19, pp. 1348-49).

the importance of preserving spheres of personal liberty, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923), including a right of intimate association. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). In truth, these interests are, cumulatively, nothing more than the individual liberty that this nation has cherished for over two centuries. At the heart of that individual liberty is the freedom to make personal choices regarding with whom one wishes to associate, and how one wishes to be governed.

The concerns surrounding religious liberty are quite obvious and substantial. *See* R. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994). Under the ordinances preempted by Amendment 2, individual landlords or employers who have sincere and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions under threat of government sanctions. *See Donahue v. Fair Employment & Housing Comm'n*, 2 Cal. Rptr.2d 32 (Cal. App. 2d Dist. 1991), *review dismissed*, 23 Cal. Rptr.2d 591, 859 P.2d 671 (Cal. 1993). *See also* Df. Aff. 17 (Artine Yapoujian) (v. 18, p. 1341; v. 19, pp. 1349-51) (employer sanctioned because his wife gave religious literature to homosexual employee). Thus, Amendment 2 accommodates significant and legitimate liberty interests.

The ordinances do not merely restrain the choices available to individuals. In Aspen, for example, § 13-98 of the sexual orientation ordinance required churches to make their facilities open to homosexual organizations if they were open to any community organization. Pl. Ex. 48 (J.A. 90-92, v. 7, pp. 148-49). Moreover, churches apparently could not refuse to hire any employees, including clergy, on the basis of their sexual orientation; title 12 of the Boulder

municipal code did not allow a church or religious organization with deeply held moral views regarding homosexuality to refuse to hire someone based on his or her sexual orientation (v. 16, pp. 1068-75). To promote free exercise values by withdrawing the authority to adopt legislation in this area altogether may not be a tailored response, but it certainly is a rational means of ensuring that core religious values are protected from infringement.

In addition to religious liberty, Amendment 2 protects notions of personal privacy and intimate association. For example, Ann Ready of Madison, Wisconsin, testified she shared a house with four other women, but refused to share it with a lesbian. She stated that she "had rejected several heterosexual males for the same reason, namely the potential for [unwanted] physical, sexual attraction." Df. Aff. 12 at 5 (v. 18, p. 1341; v. 19, pp. 1349-51). Ms. Ready was subsequently found to have violated both municipal and Wisconsin state sexual orientation laws. *Id.* at 9-10. Preventing this sort of intrusion into personal matters of the utmost privacy is a legitimate interest. "The choice of household companions -- of whether a person's 'intellectual or emotional needs' are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting).

Ordinances of the type repealed by Amendment 2 also affect familial privacy and the ability of parents to convey values to their children. This Court has expressly acknowledged that:

> the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.

> It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).[32] The implicit endorsement of homosexuality fostered by laws granting special protections could undermine the efforts of some parents to teach traditional moral values. It is certainly rational for the State to seek to prevent this kind of confusion.

The decision of the people of Colorado both to restore and preserve these liberties -- as well as an even more general right of association or non-association which exists in the absence of special protection laws -- is reflective of the time-honored view that "[t]hat government is best which governs least."[33] Clearly, Amendment 2's restoration and preservation of individual freedom, through removal or prevention of governmental regulation, is a legitimate public purpose. As this Court has recognized,

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone -- the most comprehensive

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[32]*See also Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., Warren, C.J., and Brennan, J., concurring); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[33]Thomas Paine, *quoted in* G. Seldes, *The Great Thoughts* 320 (1985); although variously attributed to Thomas Jefferson and Henry David Thoreau.

> of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted with approval in *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 n.10 (1972)).

3. Amendment 2 Achieves Statewide Uniformity and Deters Factionalism.

It is advantageous to the State to have uniform civil rights laws, both to promote efficient enforcement, and to maximize individual liberty, including the preservation of traditional social norms. The State also benefits from creating an environment where large employers and property owners may operate under uniform laws, thereby providing greater economic and legal predictability in their affairs. Equally important is the necessity of ensuring that the deeply divisive issue of homosexuality does not serve to seriously fragment Colorado's body politic. Df. Aff. 9 (James Hunter) at 14 (J.A. 264-65, v. 18, p. 1341, v. 19, 1349-51).[34]

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[34]In addition, Harvard University Government Professor Harvey Mansfield testified that enacting Amendment 2 through the initiative process supported stability and respect for the political process, by giving "the people a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment." (J.A. 197-98).

Ensuring the stability of a State's political system through combatting "unrestrained factionalism," such as here, is certainly a legitimate, indeed compelling, interest. *Storer v. Brown*, 415 U.S. 724, 736 (1974) (upholding statutory provisions barring independent candidates from the general election ballot if they had been defeated in a party primary that year, or had been registered with a political party within the past year); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (noting the importance of the State's interest in avoiding political fragmentation in the context of elections wholly within state boundaries). Amendment 2 furthers this interest by eliminating city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. (J.A. 210). Consequently, Amendment 2 serves an important state interest by promoting statewide uniformity on this issue.

* * *

Amendment 2 infringes upon no fundamental right and is amply supported by numerous rational bases. It does not encourage or authorize public or private discrimination in contravention of the Fourteenth Amendment. While a state or local government can grant more protection than that required by the United States Constitution, a state or local government can also rescind that additional protection -- and prohibit its subsequent reextension -- without committing a federal constitutional violation. *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. at 538-39. Amendment 2 does nothing more.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted this 21st day of April, 1995.

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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN and the CITY COUNCIL OF ASPEN,

Respondents.

Writ Of Certiorari To The Supreme Court Of The State Of Colorado

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QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in ruling that the Equal Protection Clause of the Fourteenth Amendment prohibits the implementation of a voter-approved amendment to the Colorado Constitution that mandates the exclusion of a specifically identified and targeted minority from participation in the normal processes of government on an equal basis with other citizens.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Proceedings Below	2
Statement of Facts	5
Summary of Argument	8
ARGUMENT	10
THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	10
I. The Right Of Citizens To Participate Equally In The Processes Of Government Is A Core Democratic Value And Fundamental Right	10
II. Amendment 2 Intentionally Tramples Upon the Right of Homosexuals To Access And Participate In The Political Processes Of Government On An Equal Basis With Other Citizens	15
III. Amendment 2 Violates The Equal Protection Clause Of The Fourteenth Amendment	17
IV. Amendment 2 Is Not Rationally Related To Any Legitimate Governmental Interest	22
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES	
Allen-Bradley Local No. 1111, Etc. v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)	6
Avery v. Midland County, Texas, 390 U.S. 474 (1968)	12
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)	21
Burson v. Freeman, 504 U.S. 191 (1992)	6
Cammermyer v. Aspin, 880 F.Supp. 910 (W.D. Wash. 1994)	7
Carrington v. Rash, 380 U.S. 89 (1965)	13, 14
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	3, 17
Colgate v. Harvey, 296 U.S. 404 (1935)	21
Davis v. Bandemer, 478 U.S. 109 (1986)	12, 14, 21
Dunn v. Blumstein, 405 U.S. 330 (1972)	14
Equality Foundation of Cincinnati v. Cincinnati, 860 F.Supp. 417 (S.D. Ohio 1994)	7
Equality Foundation of Cincinnati v. Cincinnati, Nos. 95-3855/3973/4280, 1995 WL 276248 (6th Cir. 1995)	7
Esmail v. Macrane, No. 94-3285, 63 U.S.L.W. 2658 (7th Cir. Apr. 19, 1995)	16
Evans v. Romer, 854 P.2d 1270 (Colo. 1993)	3, 4
Evans v. Romer, 882 P.2d 1335 (Colo. 1994)	4, 8
Gordon v. Lance, 403 U.S. 1 (1971)	19, 20
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)	14, 18
Harris v. McRae, 448 U.S. 297 (1980)	17

TABLE OF AUTHORITIES – Continued

Page

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1988) 7

Hunter v. Erickson, 393 U.S. 385 (1969) 13, 14, 16, 17, 19, 20

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 14

James v. Valtierra, 402 U.S. 137 (1971) 20

Kramer v. Union Free School District, 395 U.S. 621 (1969) 13, 14

MacDougall v. Green, 335 U.S. 281 (1948) 13

Missouri v. Jenkins, 495 U.S. 33 (1990) 3

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 11

Nixon v. Herndon, 273 U.S. 536 (1927) 14

Palko v. Connecticut, 302 U.S. 319 (1973) 11

Plessy v. Ferguson, 163 U.S. 537 (1896) 18, 22, 23

Plyler v. Doe, 457 U.S. 202 (1982) 10, 18, 19, 22, 24

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 10

Reynolds v. Sims, 377 U.S. 533 (1964) 13, 14

Romer v. Evans, ___U.S.___, 114 S.Ct. 419 (1993) 4

Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) 7

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 10

Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) 7

TABLE OF AUTHORITIES – Continued

Page

Tennessee Publishing Company v. American National Bank, 299 U.S. 18 (1936) 6

The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872) 21

United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217 (1967) 22

United States v. Carolene Products Co., 304 U.S. 144 (1938) 19

Vance v. Bradley, 440 U.S. 93 (1979) 13

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) 13, 14, 16, 17, 20

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) 6

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 17

Zobel v. Williams, 457 U.S. 55 (1982) 17

CONSTITUTIONAL PROVISIONS

United States Constitution, Article IV, §4 15

United States Constitution, Amendment XIV, §1 ..... *passim*

Colorado Constitution, Article II, §30b ..... *passim*

Colorado Constitution, Article V, §1 9

STATUTES AND ORDINANCES

Colorado Revised Statutes
Section 24-34-402 (1994 Cum. Supp.) 15

Section 24-34-502 (1994 Cum. Supp.) 15

Section 24-34-601 (1994 Cum. Supp.) 15

TABLE OF AUTHORITIES – Continued

Page

Aspen, Colo., Mun. Code §13-98 (1977) 2, 3, 5, 15

Home Rule Charter for the City of Aspen, Article V, Section 5.1..... 9

OTHER AUTHORITIES

Federalist No. 2 (J. Jay)..... 11

Federalist No. 10 (J. Madison) 11

Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law and Sexuality 133 (1991)..... 7

Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991).....15, 16

Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv.L.Rev. 1905 (1993)..... 21

Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv.L.Rev. 1285 (1985)..... 7

Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S.Cal.L.Rev. 797 (1984) 7

OPINIONS BELOW

The pertinent opinions of the Colorado Supreme Court are reported at 882 P.2d 1335 (Colo. 1994) (on the merits) and 854 P.2d 1270 (Colo. 1993) (preliminary injunction). (See Pet. App. B and D, respectively.) The pertinent opinions of the trial court are not reported, but may be found at Pet. App. C (on the merits) and E (preliminary injunction), respectively.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, §30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This

Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

This case once again raises the important and historically difficult question of how to balance and protect the public good and rights of a minority against the passion and weight of a majority while at the same time preserving the form and spirit of popular government as envisioned and established under the Constitution. In providing a partial response to this question, the Colorado Supreme Court held below that all citizens have a fundamental right to participate in the normal processes of government on an equal basis and that such right is protected by the Equal Protection Clause of the Fourteenth Amendment. Because the citizen-initiated amendment to the Colorado Constitution involved in this appeal infringes upon that right, the measure was found to be unconstitutional.

Proceedings Below

On November 28, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Aspen, Colo., Mun. Code §13-98 (1977). On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment

2"[1] which is intended to amend the Colorado Constitution so as to effect an immediate repeal of §13-98 of the Aspen Municipal Code and all other state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian, or bisexual citizens from invidious discriminatory acts. In addition to nullifying existing legislation and regulations, Amendment 2 also has the objective of stripping elected officials at all levels of government of their discretion and authority to adopt future anti-discrimination measures protecting gay and bisexual people regardless of how harmful or widespread the discrimination may be.

Given its duty under the Supremacy Clause to insure against violations of federal constitutional rights,[2] Aspen joined with several parties in initiating litigation in state court challenging the validity of Amendment 2. After a four-day hearing, the trial court preliminarily enjoined the enforcement of the amendment, concluding that the measure infringed upon a fundamental right and was likely unconstitutional. Petitioners herein appealed the injunction to the Colorado Supreme Court, which affirmed. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) ("*Evans I*") (Pet. App. D). In sustaining the injunction, the court found that the right of citizens to participate in the processes of government is a core democratic value and that the opportunity to participate on an equal basis in such processes constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. *Evans I*

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[1] Colo. Const. art. II, §30b.

[2] *See Missouri v. Jenkins*, 495 U.S. 33, 57 (1990); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

(Pet. App. at D-9 and D-10). The court further held that inasmuch as Amendment 2 mandated a restructuring of political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. *Evans I* (Pet. App. at D-25 to 27). The matter was thereafter remanded to the district court for a trial on the merits, including a determination of whether Amendment 2 was narrowly tailored in support of a legitimate and compelling governmental interest. Petitioners sought *certiorari* review of the Colorado Supreme Court's decision before this Court, which was denied on November 1, 1993. *Romer v. Evans*, ___U.S.___, 114 S.Ct. 419 (1993).

Trial was conducted before the state district court on October 12-22, 1993. The evidence and record developed before the court at the earlier hearing on preliminary injunctive relief were incorporated into the trial record. On December 13, 1993, the trial court entered a written order permanently enjoining the enforcement of Amendment 2, ruling that the measure was not narrowly tailored in support of a legitimate and compelling state interest and violated guarantees to the equal protection of the law as provided under the Constitution of the United States. On February 4, 1994, petitioners sought review of the district court's decision before the Colorado Supreme Court which, after *de novo* review, affirmed the trial court's analysis and findings and the entry of the permanent injunction. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) ("*Evans II*") (Pet. App. B). This Court granted *certiorari*

review of the Colorado Supreme Court's decision on February 21, 1995.

Statement of Facts

On November 28, 1977, the City Council for the City of Aspen adopted and codified at §13-98 of the Aspen Municipal Code a comprehensive anti-discrimination ordinance prohibiting discrimination in employment, housing, and public accommodations within the city, including discrimination on the basis of sexual orientation. (I:216 and VII:148.)[3] The ordinance prohibits discrimination against both heterosexual and homosexual individuals. *Id.* The prohibitions in §13-98 have proven effective in minimizing invidious discrimination within the City of Aspen for over 16 years. (VII:149.) The enactment of §13-98 has not been followed by the subsequent passage of local legislation calling for quotas or affirmative action on behalf of homosexuals, lesbians or bisexuals. (VII:156.) Instead, Aspen has chosen and successfully utilized a system of mediation to resolve discrimination complaints.[4] As demonstrated before the

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[3] References are to volume and page number of the nineteen volume main record as compiled in the trial court.

[4] Despite the existence and operation of the anti-discrimination ordinance for over 16 years, petitioners were unable to offer any evidence at the trial verifying or illustrating that Aspen's prohibition against discrimination on the basis of sexual orientation has at any time been enforced or utilized in such a way to prevent the exercise of religious liberty, compel individuals to compromise their religious beliefs, corrupt the moral values of children, or invade the bona fide employment practices of any religious organization. Moreover, these allegations

trial court, those efforts have not diminished or interfered with the city's ability to address other types of invidious discrimination and have, furthermore, advanced Aspen's public policy goals of affording all persons equal access to basic services and the means to support themselves and their families. (XV:707:14-15.)[5]

The trial court found that homosexuals have suffered a history of discrimination, (Pet. App. at C-17 to C-18), and that the preponderance of credible evidence suggested that a person's sexual orientation results from a biological or genetic "component." (Pet. App. at C-17.) These findings are not unusual or unique, for other courts that have carefully examined these matters have come to the same conclusion. *Compare, Watkins v. U.S. Army*, 875 F.2d 699, 726-27 (9th Cir. 1989) (Norris, J., concurring) (pervasive

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as suggested by petitioners (see pages 44-46 of petitioners' brief) reflect "as applied" challenges to the ordinance that may only be raised in the context of an actual case or controversy. In the event of a successful challenge, a limiting construction of the ordinance rather than a facial invalidation would be all that is called for. *See Burson v. Freeman*, 504 U.S. 191, 210 n.13 (1992). In the absence of any factual record upon which to support a claim that Aspen's ordinance has been applied to create the results or circumstances described by petitioners, petitioners' attack on the validity of the ordinance calls for speculation and should not be entertained. *Tennessee Publishing Company v. American National Bank*, 299 U.S. 18, 22 (1936) ("[i]t is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it"); *Allen-Bradley Local No. 1111, Etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) (courts are not to assume in advance that a law will be construed as to bring it into conflict with the Federal Constitution).

[5] Affidavit of Mayor John S. Bennett, pages 2-3.

discrimination and immutable characteristic) *with High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1988) (homosexuals have suffered a history of discrimination, but homosexuality not an immutable characteristic); *see also Equality Foundation of Cincinnati v. Cincinnati*, 860 F.Supp. 417, 437 (S.D. Ohio 1994), *rev'd on other grounds*, Nos. 95-3855/3973/4280, 1995 WL 276248 (6th Cir. 1995) (history of invidious discrimination and immutable characteristic); *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*) (homosexuals have historically been the object of pernicious and sustained hostility as the likely result of deep-seated prejudice rather than rationality); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law and Sexuality 133, 148-52 (1991); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv.L.Rev. 1285, 1303 (1985); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S.Cal.L.Rev. 797, 824-25 (1984).[6] The evidence below also established that homosexuals are viewed with unsurpassed disdain and hostility by the population at large. (XV:562-63 and XVI:911-12.)[7]

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[6] The Federal Government may itself be the most prominent practitioner of systematic discrimination against homosexual citizens. *See Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Cammermyer v. Aspin*, 880 F.Supp. 910 (W.D. Wash. 1994).

[7] University of Michigan Institute for Social Survey Research.

Summary of Argument

As described by its originators and promoters, Amendment 2 was initiated to fend off "militant gay aggression" and foreclose government from providing homosexuals "protected class status." (Pet. App. C-7 and XV:839, 842-45 and 853.)[8] Pursuant thereto, Amendment 2 was designed to dilute and lessen the ability of homosexuals to participate in Colorado's political system.[9] While the immediate aim of Amendment 2 is to eliminate all existing legal protections shielding homosexuals from discrimination, its ultimate and more important objective is to alter the traditional processes of government so as to permanently limit and prevent the enactment of any future anti-discrimination measures on behalf of homosexuals absent the consent of a state-wide majority. This prohibition is to be uniformily applied regardless of the locale, severity or extent of the discrimination and its impact on homosexual citizens, or upon the general welfare of the public as a whole.

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[8] "It was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease . . . And so the only way to ensure that this kind of activity would stop would be through passage of a constitutional amendment." Mr. Tony Marco, founder of Colorado for Family Values. (XV:839.)

[9] "Amendment 2 *sought* to deny an independently identifiable group's right to participate equally in the political process." *Evans II*, 882 P.2d at 1349 (emphasis added).

Under Amendment 2, homosexuals[10] are foreclosed from seeking or obtaining anti-discrimination protections from their local elected representatives and governmental entities while every other person or class of persons may do so. Likewise, under Amendment 2 homosexuals are foreclosed from seeking or obtaining anti-discrimination protections from their state-elected representatives and legislature, while every other person or class of persons may do so. Finally, under Amendment 2 homosexuals are foreclosed from directly initiating the enactment of anti-discrimination legislation through the citizen-initiative processes guaranteed to citizens under the Colorado Constitution[11] and charters of home rule municipalities,[12] while every other person or class of persons may do so. Hence, Amendment 2 uniquely and purposefully alters the system of government in Colorado for one and only one purpose – to deny homosexuals legal protection from

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[10] For ease of reference and economy, the term "homosexual(s)" shall be used in this brief as shorthand for "homosexuals, bisexuals and lesbians."

[11] Article V, §1(2) of the Colorado Constitution provides in relevant part that "[t]he first power hereby reserved by the people is the initiative . . . " Article V, §1(9) mandates that the initiative power is further "reserved to the registered electors of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities."

[12] Article V, Section 5.1(a) of the Home Rule Charter for the City of Aspen provides, in part, that "[t]he electors of the City shall have power to propose any ordinance to the council in accordance with the provisions of this article of the Charter . . . In the event council fails to adopt said proposed ordinance . . . the said proposed ordinance shall be submitted to the electors for their acceptance or rejection."

discrimination. No historical precedent exists in Colorado for such an oppressive measure.

"The Framers of the Constitution knew, and we should not forget today that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). "A citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring). Because Amendment 2 unequivocally impairs the substantive right and liberty conferred on all citizens by the Constitution to participate on an equal basis in the processes of government, the Colorado Supreme Court properly invalidated the measure.

ARGUMENT

THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

I. The Right Of Citizens To Participate Equally In The Processes Of Government Is A Core Democratic Value And Fundamental Right.

Fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973), or "deeply rooted in this Nation's history and traditions," *Moore v. City of East Cleveland*, 431 U.S. 494, 803 (1977), or "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1973).

From the earliest days of our Nation's history it was recognized that "[t]o all general purposes we have uniformly been one people, each individual citizen everywhere enjoying the same national rights, privileges, and protection." The Federalist No. 2, at 38-39 (J. Jay) (C. Rossiter ed. 1961). Hence, one of the central issues of debate during the drafting and ratification of the Constitution was the potential for varying factions operating under the new American political system to subvert or manipulate the processes of government to the disadvantage and injury of specific individuals or minority groups of citizens. "Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflict of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." The Federalist No. 10, at 77 (J. Madison), *supra*. While a minority might "clog the administration, . . . [and] may convulse the society, . . . " *id.* at 80, it was the threat of majoritarian excesses that most concerned the Framers. "A common passion or interest will, in almost every case, be felt by a majority of the

whole; a communication and concert results from the form of government itself; and there is nothing to check the inducement to sacrifice the weaker party or an obnoxious individual." *Id.* at 81. "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." *Id.* at 80. "[N]either moral nor religious motives can be relied on as an adequate control." *Id.* at 81.[13]

Given the inherent advantage and power of majorities, American constitutional jurisprudence has long recognized the fundamental importance of equal representation and a "level playing field" in the meaningful and fair operation of our governmental processes.

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[13] As demonstrated by the text above, and taking into consideration the context of the time during which it was originally written and debated, terms such as "minority," "minor party" or "minority interests" were not directed at, nor intended to be limited to, persons or groups that are today recognized as "suspect classes." *See Davis v. Bandemer*, 478 U.S. 109, 131 n.12 (1986) (like racial gerrymandering, political gerrymandering and political fairness subject to constitutional scrutiny); *Avery v. Midland County, Texas*, 390 U.S. 474, 481 (1968) ("Government – National, State, and local – must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.").

"[E]very citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). The presumption underlying the Constitution that improvident decisions will eventually be rectified by the democratic process, *Vance v. Bradley*, 440 U.S. 93, 97 (1979), can only be sustained if that process is equally available to all. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("fencing out" from the franchise a sector of the population because of the way it may vote is constitutionally impermissible). If a system of government is to be fair, one group cannot always be expected to win. *Hunter v. Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring). Governmental processes must be designed with the "aim of providing a just framework within which the diverse political groups in our society may fairly compete." *Id.* at 393. Accordingly, allocations of governmental power must be distributed neutrally on the basis of general principles. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (citing *Hunter*, 393 U.S. at 395). "The theme of the Constitution is equality among citizens in the exercise of their political rights," and "while the Constitution itself may sanction certain inequalities in some aspects of the political system, that does not justify the state in creating additional ones." *MacDougall v. Green*, 335 U.S. 281, 289-90 (1948) (Douglas, J., dissenting). These general constitutional principles and commands ensure that citizens will have an effective voice in governmental affairs which substantially affect their lives. *See Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969).

The existence and fountainhead nature of the right to equally participate in the political processes of government are best illustrated in those decisions of the Supreme Court wherein attempts to restrict or condition the exercise of the right have been invalidated. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (ballot access requirements); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (burdensome residency requirements); *Kramer v. Union Free School District, supra* (property qualifications); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll tax); *Carrington v. Rash, supra* (occupation discrimination); *Nixon v. Herndon*, 273 U.S. 536 (1927) (race qualifications). Likewise, the right has implicitly surfaced in those cases where a political process or structure has been established or manipulated to dilute effective citizen participation, or disadvantage a minority group. *Reynolds v. Sims, supra* (vote dilution); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Hunter v. Erickson, supra;* and *Washington v. Seattle School District No. 1, supra* (structural manipulation disadvantaging minority).

As properly concluded by the state court, the decisions of the United States Supreme Court have steadfastly recognized the fundamental importance of fair and accessible political processes to our system of government and a corresponding "inalienable right" to full and equal participation therein. *Reynolds v. Sims*, 377 U.S. at 565. A rejection of the fundamental nature of the right to participate equally in the processes of government would defeat liberty and sacrifice justice.

II. Amendment 2 Intentionally Tramples Upon the Right of Homosexuals To Access And Participate In The Political Processes Of Government On An Equal Basis With Other Citizens.

Prior to the passage of Amendment 2, any individual citizen or group of citizens subjected to invidious discrimination could access the systems and processes of government at either the state or local level and petition their elected representatives for legislation or other legal protection prohibiting such harmful conduct. Many Colorado citizens did. Some of those efforts were successful while others were not. *See and compare, e.g.*, Colo. Rev. Stat. §§24-34-402, 502 and 601 (1994 Cum. Supp.) (prohibiting discrimination in employment, housing and public accommodations on the basis of disability, race, creed, color, sex, marital status (housing and public accommodations only), national origin, ancestry, age (employment only), familial status (housing only), religion (housing only)); *see also* Aspen, Colo. Mun. Code §13-98 (1977). After the passage of Amendment 2, all individual citizens or groups of citizens may continue to rely on the regular processes of government as they deem necessary for purposes of seeking anti-discrimination protections, *except homosexuals*.[14] As a result of Amendment 2, the

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[14] As one commentator has recently described, classical eighteenth-century constitutional doctrine studied by the Framers specifically included a "right to protection." The advocates of the Constitution argued, among other things, that citizens would enjoy greater security under the Constitution than under the Articles of Confederation. Protection was not only to be afforded from external threats and foreign invasion, but from "domestic Violence." U.S. Const., art. IV, §4; *see also* Steven J.

Colorado Constitution will provide: "No person who is a homosexual may apply for or obtain protection from invidious discrimination without first securing the approval of a majority of the electorate at a statewide election, but everyone else may." *E.g., Esmail v. Macrane*, No. 94-3285, 63 U.S.L.W. 2658, 2659 (7th Cir. Apr. 19, 1995).

Amendment 2 makes no attempt to allocate the tools of government in an impartial manner, or further a general principle fairly applicable to all citizens. Like the measures in *Hunter* and *Washington v. Seattle School District No. 1*, Amendment 2 simply has the purpose of permanently subjecting the political aspirations and legal needs of a minority class of citizens to the raw power and numerical strength of a state-wide majority. However, as stated in *Hunter*, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's

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Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 524-25 (1991) (discussing relationship of National government to States). The classical tradition identifies liberty with protection. Individuals originally entered into society and consented to government to secure their rights against private violence. *Id.* at 532-33. The southern States' failure to protect blacks from discrimination at the hands of whites was the central reason for the adoption of the Fourteenth Amendment and protective Federal civil rights legislation. It has been argued that in establishing and declaring a Federal right to protection, the Fourteenth Amendment did no more than recognize and incorporate into the Constitution the concept of protection as understood in the classical tradition by the Framers. *Id.* at 546. This right to protection is shared equally by all citizens. *Id.* at 554-66.

vote or give any group a smaller representation than another of comparable size." *Hunter v. Erickson*, 393 U.S. at 393; *see also Harris v. McRae*, 448 U.S. 297, 322 n.25 (1980) (if a State adopts an electoral system, the Equal Protection Clause confers upon a qualified voter the substantive right to participate in the electoral process equally with other qualified voters). To allow otherwise would dilute and threaten the fundamental principles of fairness and equal opportunity that distinguish the American system of government from most every other system in the world. *Washington v. Seattle School District No. 1*, 485 U.S. at 470 (political majority may generally restructure the political process to place obstacles in the path of persons or groups seeking governmental action so long as such obstacles are placed in the path of everyone).

III. Amendment 2 Violates The Equal Protection Clause Of The Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall deny to any person within its jurisdiction the equal protection of the law and mandates that all persons similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). It does not make some groups of citizens "more equal than others." *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring). The safeguards provided under the Equal Protection Clause apply to all citizens, not just those that comprise "suspect classes." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In determining what classifications may be unconstitutionally discriminatory, the Court has never been

unalterably anchored to fixed concepts of equality. *Harper v. Virginia State Board of Elections*, 383 U.S. at 669.[15]

Given its recognition of the fundamental right of citizens to participate equally in the political process, the Colorado Supreme Court subjected Amendment 2 to strict judicial scrutiny and required the State to demonstrate that the classifications drawn in the measure were precisely tailored to advance a compelling governmental interest. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982). The court found none of the interests put forward by the State in defense of Amendment 2 compelling, much less precisely tailored in support of those interests. (Pet. App. B-8 n.5.)

The State argues that the courts below erred in applying strict scrutiny in determining Amendment 2's constitutional sufficiency because 1) no fundamental right is

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[15] "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear." *Harper*, 383 U.S. at 669 (emphasis in original). In footnote 6 of the *Harper* decision, the Court provided an example of such an expression: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. 163 U.S. 669."

invaded by Amendment 2, and 2) it is perfectly permissible under the Equal Protection Clause of the Fourteenth Amendment for the State to discriminate against discrete minorities in the structure and operation of political processes so long as such discrimination is not drawn along racial lines. *But see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (prejudice against discrete and insular minorities may be a special condition calling for more searching judicial inquiry).

As discussed above, the right to participate equally in the basic public political processes under which our system of government operates is fundamental and implicitly guaranteed by the Constitution. As Justice Blackmun wrote in support of the ruling in *Plyler v. Doe*, "a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler*, 457 U.S. at 233. Those denied that right would be relegated in a most basic way to second-class status. *Id.* Furthermore, and contrary to the claims as put forth by the State, the right to participate on an equal basis in our system of government is not reserved to any one group, and is not limited in its exercise or protection to racial minorities or "suspect" classes. "[T]he State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute *any person's* vote. . . . " *Hunter v. Erickson*, 393 U.S. at 393 (emphasis added); *see also Gordon v. Lance*, 403 U.S. 1, 7 (1971) (so long as election provisions do not discriminate against or authorize discrimination against an *identifiable class*, they do not violate the Equal

Protection Clause).[16] Intentionally structuring or restructuring the shape and process of government for the

[16] The State's reliance on the Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971) to justify the exclusion of homosexuals, and potentially all unpopular minorities not defined by race or other non-suspect characterization, from equal participation in the political processes of government is misdirected. The constitutional amendment at issue in *James* did not specifically name or target an independently identifiable group for unfair treatment, i.e., "independently identifiable" in the sense that the existence and identity of the persons comprising the group, and the group itself, can be readily defined apart from the particular political issue placed before the electorate. Moreover, the ballot question in *James* addressed the public financing of low-rent housing and was not intended or imposed to diminish the political rights of those persons in favor of public housing, or permanently exclude a class of persons from the protection of the law. *See also Gordon v. Lance*, 403 U.S. at 5 ("we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing").

The contention that the Colorado Supreme Court's holding is without limits is also not well-grounded. The scenerios posited by the State fail to recognize that unlike Amendment 2, the prohibitions imposed under the various examples applied equally to all persons on both sides of the given subject. For instance, while Colorado's ban on public funding for abortions clearly disadvantages women who cannot obtain the medical procedure absent financial assistance, the ban applies to all women. Amendment 2, on the otherhand, does not equally prohibit the enactment of anti-discrimination measures absent a constitutional amendment for everyone, just homosexuals. The mechanisms with which to achieve anti-discrimination protections via the political processes of government have not been neutrally distributed under Amendment 2. *See Hunter*, 393 U.S. at 392-93; *Washington v. Seattle School District No. 1*, 458 U.S. at 476-77. Rather, the political process has been altered for the sole

purpose of excluding or diluting the equal participation and effectiveness of a targeted political minority is no less offensive to the Equal Protection Clause than if the manipulations had been carried out in order to disable a racial minority. *Davis v. Bandemer*, 478 U.S. 109, 125, 132-33 (1986) (pluralty opinion) (actual denial of chance to effectively influence political process as result of intentional discrimination against an *identifiable political group* violates equal protection) (emphasis added).[17]

purpose of disadvantaging homosexuals. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv.L.Rev. 1905, 1918 (1993).

[17] While the contention that Amendment 2 impermissibly invades protected privileges and immunities was not expressly presented before the Colorado Supreme Court, the Aspen respondents endorse and adopt Justice Scott's concurring opinion finding that Amendment 2 violates the Privileges or Immunities Clause of the Fourteenth Amendment. Although not unmindful of the "numerous unsuccessful efforts to give the clause application," *Colgate v. Harvey*, 296 U.S. 404, 431-32 (1935), "there are privileges and immunities . . . ; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them." *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1873).

Privileges and immunities entail those rights that are fundamental and "belong of right to citizens of all free governments." *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872). There is no fixed catalogue of privileges or immunities and the Court has earlier decreed that it would be excused from explicitly defining them "until some case involving those privileges may make it necessary to do so." *Id.* at 78-79. Amendment 2 presents such a case.

A right to participate on an equal basis in the processes of government has been consistently reflected in the numerous political participation cases that have previously come before the Supreme Court. (*See* Sections I-III above.) This right is inclu-

IV. Amendment 2 Is Not Rationally Related To Any Legitimate Governmental Interest.

Whether or not Amendment 2 is rationally connected to and supported by a legitimate governmental purpose was left undetermined by the Colorado courts. To the extent the issue is now before this Court, the Aspen respondents adopt and incorporate herein the brief of their co-respondents. The Aspen respondents would add, however, that it can hardly be argued rationally that any legitimate public purpose is served, or anyone benefited, by the christening of a new class of "untouchables," one openly sanctioned by law and perpetuated by its inability to obtain legal protection or relief from invidious discrimination. *See Plyler v. Doe,* 457 U.S. 202, 241 (1982) (Powell, J., concurring). Our Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163

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sive of the right to petition for redress of grievances. Like the other more particularized rights that together comprise and enforce the right to participate equally in the political process, the right to petition is among the most precious of liberties, *United Mine Workers of America v. Illinois State Bar Association,* 389 U.S. 217, 222 (1967), and it is equally extensive and enforceable with respect to matters of local concern as to matters of federal concern. *Id.* at 224 n.9. As a fundamental right, it is not dependent upon the positive laws or protections of any State, for it springs from the very essence of the republican form of government established under the Constitution.

Amendment 2 directly invades and reduces the right of homosexuals to petition their government for redress of grievances, and eliminates it altogether at the state and local legislative levels. Because it does so, Amendment 2 unconstitutionally burdens the exercise of a fundamental right inherently vested in citizens of the United States and violates the Privileges or Immunities Clause of the Fourteenth Amendment.

U.S. 537, 559 (1896) (Harlan, J., dissenting). "In respect to civil rights, all citizens are equal before the law." *Id.*

CONCLUSION

If allowed to become law, Amendment 2 will extinguish all legal protections currently in place within the City of Aspen and the state of Colorado adopted to insure that homosexuals have a fair opportunity to hold a job, secure a decent place to live, and receive public services on an equal basis with other citizens. It will also effectively cast homosexuals out of the halls of state and local government by requiring them, and their duly elected representatives, to seek approval from a state-wide majority prior to securing protection from discrimination. Arguably, the City of Aspen and its City Council will not even be able to restrict or control the discriminatory conduct of their own employees in the delivery of services to Aspen citizens should the need present itself. To say that Amendment 2 does not impose any "special burdens" on homosexual citizens in securing legislative or other legal relief from invidious discrimination simply ignores the plain language and intent of the enactment.

One *amicus curiae* participating in this matter has suggested that by approving Amendment 2, Colorado voters, exercising their rights as "We, the People," did nothing more than make a "final decision" regarding the granting of alleged "special protected status to homosexuals."[18] Respondents disagree and respectfully suggest

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[18] Brief of Equal Rights, Not Special Rights, Inc., in support of petitioners, page 11.

that when a political majority, through the raw power of its numbers, undertakes to restructure the process of government so as to create two paths over which citizens must travel to obtain relief from invidious discrimination; one path for one group of citizens and another, more accommodating path, for the majority and such other groups as *it* may select, it immediately and inevitably creates class distinctions of the type fundamentally at odds with the goals and intent of our form of government and the Equal Protection Clause. Amendment 2 directly attacks and does violence to the notion that we have uniformly been one people, each individual everywhere enjoying the same national rights, privileges, and protections. U.S. Const. amend. XIV, §1. As expressed by Justices Powell and Blackmun in the *Plyler* case, a legislative classification that threatens the creation of an underclass cannot be reconciled with the purposes of the Fourteenth Amendment.

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted this 19th day of June, 1995.

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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA POWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Colorado Case Nos. 94SA048 and 94SA128

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QUESTION PRESENTED

Whether an initiated state constitutional amendment that forbids the state and all local governments from adopting or enforcing any law or policy protecting gay people from public or private discrimination violates the Equal Protection Clause of the Fourteenth Amendment because it burdens the fundamental right of gay people to participate in the political process and it fails rationally to advance a legitimate governmental purpose.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF CASE 1

I. Proceedings Below 1

II. Factual Background 3

A. History of Anti-Discrimination Law in Colorado Prior to Amendment 2's Enactment 3

B. Legislative History of Amendment 2 7

C. Scope and Meaning of Amendment 2 ... 8

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. A STATE LAW THAT SINGLES OUT GAY PEOPLE AND INTENTIONALLY DENIES THEM ALL EFFECTIVE OPPORTUNITY TO SEEK RELIEF FROM DISCRIMINATION THROUGH THE POLITICAL PROCESS REQUIRES HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 15

A. The Colorado Supreme Court Correctly Identified the Principles Triggering Heightened Scrutiny 15

TABLE OF CONTENTS – Continued

Page

1. The Fourteenth Amendment Prohibits States from Gerrymandering Governmental Structure for the Purpose of Depriving Members of Targeted Groups of Equal Participation in the Political Process 16

2. The Fourteenth Amendment Does Not Afford States Unlimited Power to Discriminate In the Structure of Government Simply Because the Discrimination Targets Classes Not Deemed Suspect 23

a. State Allocations of Governmental Power Are Not Exempt from the Fourteenth Amendment 24

b. The Right to Equal Political Access Belongs to All People, Not Just to Members of Suspect Classes 25

c. Heightened Scrutiny is Required Only Where the Discriminatory Exclusion from the Political Process Is Intentional and the Effects of the Exclusion Are Substantial 29

B. The Colorado Supreme Court Correctly Determined that the Extraordinarily Discriminatory Circumstances of this Case Required Heightened Scrutiny 32

TABLE OF CONTENTS – Continued

Page

1. Amendment 2 Intentionally Excludes Only Gay People from Equal Opportunity to Participate in the Political Process 33

2. The Burden on Gay People Is Devastating in that Amendment 2 Bans Them from Seeking Any Relief from Any Level of Government for Any Claim of Discrimination Against Them 34

II. EVEN IF AMENDMENT 2 IS ONLY SUBJECT TO RATIONAL BASIS REVIEW, AMENDMENT 2 BEARS NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE STATE PURPOSE 35

A. If the Breadth and Selectivity of the Burdens Imposed by a Classification Can Only Be Explained by Antipathy Toward a Particular Group, Then the Classification Does Not Rationally Serve Any Legitimate Purpose..... 36

B. None of the State's Proffered Interests Bears a Rational Relation to Amendment 2 39

1. Amendment 2 Is Not Rationally Related to Any Legitimate Interest in Religious Freedom or Associational Privacy..... 39

2. Amendment 2 Is Not Rationally Related to Protecting the Integrity of Civil Rights Laws..... 41

TABLE OF CONTENTS – Continued

Page

3. Amendment 2 Is Not Rationally Related to the Creation of Uniform Civil Rights Laws..... 44

4. Amendment 2 Is Not Rationally Related to the Purpose of Inculcating Children with "Traditional Moral Values"..... 44

5. Amendment 2 Is Not Rationally Related to any Legitimate Purpose of Deterring Factionalism..... 46

C. The Selectivity, Severity and Legislative History of Amendment 2 Demonstrate that Its Burdens on Gay People Can Only Be Attributable to Antipathy, an Illegitimate State Purpose 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (June 12, 1995) 25

Avery v. Midland County, 390 U.S. 474 (1968) 19, 26

Ball v. James, 451 U.S. 355 (1981)..... 30

Block v. Meese, 793 F.2d 1303 (CADC 1986) 44

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 18

Bowers v. Hardwick, 478 U.S. 186 (1986)..... 45

Burdick v. Takushi, 504 U.S. 428 (1992).....23, 30

Carrington v. Rash, 380 U.S. 89 (1965) 26

Cipriano v. City of Houma, 395 U.S. 701 (1969) 16

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 47

Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013, 2 Cal. Rptr. 2d 648 (Cal. App. 1991) 37

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ..... *passim*

City of Edmonds v. Oxford House, Inc., 63 U.S.L.W. 4402 (May 15, 1995) 11

City of Mobile v. Bolden, 446 U.S. 55 (1980) 30

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987)..... 45

Crawford v. Bd. of Educ., 458 U.S. 527 (1982).....18, 25

Dandridge v. Williams, 397 U.S. 471 (1970) 38

TABLE OF AUTHORITIES – Continued

Page

Davis v. Bandemer, 478 U.S. 109 (1986).... 16, 18, 20, 30

Equality Foundation v. City of Cincinnati, 54 F.3d 261 (CA6 1995)..... 33

Evans v. Romer, 854 P.2d 1270 (Colo. 1993)..... 2, 9, 11, 19

Evans v. Romer, 882 P.2d 1335 (Colo. 1994)...3, 7, 8, 34, 45

F.C.C. v. Beach Communications, 113 S. Ct. 2096 (1993) 36, 38

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 20, 24, 26, 27

Gordon v. Lance, 403 U.S. 1 (1971)..... *passim*

Heller v. Doe, 113 S.Ct. 2637 (1993).....37, 43, 49

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 24

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)..... 17

James v. Strange, 407 U.S. 128 (1972)..... 38

James v. Valtierra, 402 U.S. 137 (1971)..23, 25, 27, 28, 32

Johnson v. De Grandy, 114 S.Ct. 2647 (1994)..... 30

Karcher v. Daggett, 462 U.S. 725 (1983)..... 20

Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 16, 26

New Orleans v. Dukes, 427 U.S. 297 (1976) 38

Norman v. Reed, 502 U.S. 279 (1992) 17

Palmore v. Sidoti, 466 U.S. 429 (1984) 36

TABLE OF AUTHORITIES – Continued

Page

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 47

R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992) 47

Republican Party of North Carolina v. Martin, 980 F.2d 943 (CA4 1992), *cert. denied*, 114 S.Ct. 93 (1993) 16

Reynolds v. Sims, 377 U.S. 533 (1964) 16, 18, 19, 26

Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) 30

U.S. Term Limits, Inc. v. Thornton, 63 U.S.L.W. 4413 (May 22, 1995) 9

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 36, 37, 46

United States v. Carolene Products Co., 304 U.S. 144 (1938) 17

Vance v. Bradley, 440 U.S. 93 (1979) 17, 36

Washington v. Davis, 426 U.S. 229 (1976) 30

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) ..... *passim*

Williams v. Vermont, 472 U.S. 14 (1985) 40

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 38

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. 45, 47, 50

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XV 20, 27

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND ORDINANCES

C.R.S. § 10-3-1104 ..... 6, 10

C.R.S. § 24-34-402 3

C.R.S. § 24-34-402.5 ..... 4, 11

C.R.S. § 24-50-115 10

Aspen Mun. Code § 13-98(a)(1) 3, 6

Boulder Rev. Code § 12-1-2(2)(1)(A) 3, 6

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COURT RULE

C.R.C.P. 54(b) 2

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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Note, *Constitutional Limits on Anti-Gay-Rights Initiatives,* 106 Harv. L. Rev. 1905, 1917 (1993) 26

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STATEMENT OF CASE

The issue in this case is whether a state constitutional amendment that forbids the state government and all local governments from adopting or enforcing any law or policy protecting gay people from discrimination on the basis of their sexual orientation violates the Equal Protection Clause of the Fourteenth Amendment. Amendment 2, adopted by Colorado voters in 1992, provides,

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

I. Proceedings Below

Shortly after passage of Amendment 2, the plaintiffs filed suit in Denver District Court, requesting a declaration that Amendment 2 is unconstitutional and an injunction to prevent enforcement of the amendment. The individual plaintiffs are lesbians and gay men who had worked to obtain legislation or government policies that protect them from discrimination.[1] They claimed that

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[1] The plaintiffs are the respondents here and will be referred to as "the plaintiffs" in this brief. The individual plaintiffs include Richard Evans, an administrator for the City and County of Denver, Angela Romero, a Denver police officer, John Miller, a professor and chair of the University of Colorado's faculty council, Paul Brown, an employee of the Colorado Department of

Amendment 2 violates their right to equal protection of the laws because Amendment 2 places unique burdens on their ability to participate in the political process and does not rationally advance any legitimate governmental purpose. The governmental plaintiffs, the cities of Denver, Boulder and Aspen and the Boulder Valley School District, claimed that Amendment 2 impermissibly restricts their ability to guarantee the rights of individuals to equal protection.

On January 15, 1993, the Denver District Court granted the plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2. The Colorado Supreme Court affirmed the district court ruling in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), Pet. App. D, holding that Amendment 2 is subject to strict judicial scrutiny because it "fences out" an independently identifiable class of persons and burdens class members' fundamental right to participate in the political process. The appellate court remanded the case to allow the state to attempt to prove that the amendment serves a compelling interest.

After trial, the district court ruled that Amendment 2 does not serve any compelling state interest by the least restrictive means. The court permanently enjoined the enforcement of Amendment 2 and certified its decision as final under C.R.C.P. 54(b).[2] The Colorado Supreme Court

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Natural Resources, Priscilla Inkpen, a Boulder minister, and Linda Fowler, who chaired the Denver mayor's task force on gay and lesbian issues. They sought, through the political process, local ordinances, a governor's executive order, police department regulations, and a university non-discrimination policy, all of which were intended to prohibit discrimination on the basis of sexual orientation. R.7:13,16,50-52,87-91,104-16,142.

[2] Under C.R.C.P. 54(b), the court certified as final only its ruling that Amendment 2 violates the plaintiffs' Fourteenth Amendment right to participate in the political process. J.A.267-68. Thus, although the plaintiffs could not cross-appeal

upheld the permanent injunction, affirming the district court's determination that Amendment 2 does not serve any compelling state interest.[3] *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), Pet. App. B.

II. Factual Background

To understand the purpose and effect of Amendment 2, it is necessary to review (1) the history of anti-discrimination law in Colorado prior to Amendment 2's enactment; (2) the legislative history of Amendment 2; and (3) the scope and meaning of the amendment.

A. History of Anti-Discrimination Law in Colorado Prior to Amendment 2's Enactment.

State and local law in Colorado prohibits arbitrary or unfair public and private discrimination in various commercial and governmental contexts. Some state and local laws enumerate specific grounds that are deemed to be impermissible bases for decision-making, such as veteran's status, marital status, race, age, disability, and political affiliation. *See, e.g.*, C.R.S. § 24-34-402; Denver Mun. Code art. IV § 28-91(b), J.A.32; Boulder Rev. Code § 12-1-2(a)(1)(A), J.A.65; Aspen Mun. Code § 13-98(a)(1), J.A.90. Other laws prohibit arbitrary discrimination more generally. For instance, Colorado law generally prohibits private employers from discriminating against employees

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the district court ruling that gay people are not entitled to suspect or quasi-suspect classification, Pet. App. C-14-19, they do not concede that the district court ruling on this issue was correct. A number of the plaintiffs' claims remain pending in the district court, including their claim that Amendment 2 violates the First Amendment.

[3] The State does not appeal from the Colorado Supreme Court's ruling that Amendment 2 does not serve any compelling state interest.

on the basis of any legal off-duty conduct. C.R.S. § 24-34-402.5.

The trial court found that gay people had suffered from a long history of discrimination. Pet. App. C-18; R.12:178-239; 15:707-08; Boswell aff. at ¶¶ 14-19.[4] The undisputed facts show that gay people in Colorado have experienced the same sort of discrimination,[5] including discrimination in the provision of basic government services like police protection.[6] Perceiving a need to remedy

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[4] During the decade after World War II, the United States government persecuted gay people as "moral perverts." R.12:204. In 1953, President Eisenhower issued an executive order requiring the discharge of all gay and lesbian employees from any type of federal employment; the rule also applied to companies that had federal contracts. R.12:204-05. Well into the 1970's, police departments arrested thousands of people for "disorderly conduct" because they were perceived to be gay or lesbian. R.12:191-204. More Americans harbor strong antipathy to gay people than to any other group in America, including African-Americans, Hispanics, Jews and undocumented aliens. University of Michigan Institute for Social Survey Research, R.15:562-63; 16:911-12. And gay people are subject to more hate-related violence than any other group in the nation. *See* Kevin T. Berrill, "Anti-Gay Violence and Victimization in the United States: An Overview," in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19 (Gregory M. Herek and Kevin T. Berrill, eds., 1992).

[5] R.7:4-165; 8:42-64; 12:121,192-93,210-11; 15:707; 19:1350, 1362-63; Foster aff. at ¶¶ 3, 14; Pena aff. at ¶¶ 2,3,6; Durgin aff. at ¶¶ 7-10,14; Bennett aff. at ¶ 8; Damon aff. at ¶ 5; *see* Pl.Ex. 102 (City and County of Denver, Dep't of Safety, *Hate Crimes in 1991-1992*), R.16:447.

[6] The Denver Police Department persistently harassed gay people by arresting their political leaders and confiscating their newspapers; the Denver police also targeted gay people by arresting them on pretextual grounds, such as jaywalking. R.12:192-93. In 1973 the Department signed an agreement with the Colorado Gay Alliance to stop such governmental harassment. R.12:210-11. Plaintiff Angela Romero, a police officer, testified that she was transferred from the school resource program to patrol duty when her supervisor discovered that she had purchased research materials from a lesbian bookstore. Other officers refused to provide back-up protection for her after she returned to patrol duty. R.7:104-16,142.

such public and private discrimination, state and local governments in Colorado enacted various laws to forbid discrimination on the basis of sexual orientation by both government and private persons.

Most of these laws and policies prohibited discrimination by governmental actors such as police officers, judges and other governmental employees. These measures include:

> an Executive Order by the Governor prohibiting discrimination in state employment, No. D0035 (Dec. 10, 1990), J.A.22-23;
>
> Canon 3(a)(9) of the Code of Judicial Conduct prohibiting judicial prejudice or bias based on sexual orientation, J.A.30;
>
> Denver Police Department regulations prohibiting officers from discriminating against fellow officers, complainants, or violators on the basis of sexual orientation or from using derogatory language relating to sexual orientation during police radio transmissions, §§ 19-10(c), RR-122, RR-128, Dir. 91-13, J.A.57-59;
>
> the policies of Colorado State University, Metropolitan State College and the Boulder Valley School District prohibiting discrimination on the basis of sexual orientation, J.A.82-85;
>
> and ordinances or resolutions enacted by the cities of Boulder and Aurora, and the County of Boulder prohibiting discrimination on the basis of sexual orientation in local government employment, J.A.60-61,63-64,69,94.

In addition to prohibitions against governmental discrimination, state and local governments also prohibited private discrimination. These laws include:

> a state statute prohibiting discrimination on the basis of sexual orientation in insurance underwriting practices, C.R.S. § 10-3-1104, J.A.25;[7]
>
> Denver, Boulder, and Aspen ordinances prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations, Denver Mun. Code art. IV, §§ 28-91 to -116 (1991); Boulder Rev. Code §§ 12-1-2 to -4 (1987); Aspen Mun. Code § 13-98, J.A.32-53,62-79,90-92;
>
> and Rule 1.2(f) of the Colorado Rules of Professional Conduct prohibiting lawyers from engaging in "conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's sexual orientation," J.A.31.

Because these laws prohibit discrimination on the basis of sexual orientation generally, all of these laws protect heterosexual as well as gay people from discrimination. R.8:38.

Prior to the enactment of Amendment 2, nothing prevented government or voters from repealing any of these anti-discrimination laws and policies. Similarly, nothing required them to adopt any additional such laws or policies. For example, the voters of Fort Collins and the city council in Colorado Springs had rejected proposed ordinances forbidding discrimination on the basis of sexual orientation. Pet. App. F-4; R.7:21-23; 19:1346; Pl.Ex. 116. A Colorado Civil Rights Commission proposal

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[7] The Colorado Insurance Code was amended in 1989 to deter insurance underwriting practices such as the refusal to write health or life insurance for men who live in certain residential areas identified by zip code, who are engaged in certain occupations, or who designate a non-related individual as an insurance beneficiary. R.8:142-44.

to add sexual orientation to the list of forbidden criteria for discrimination in the state's civil rights laws was not even introduced in the General Assembly. R.9:23.

B. Legislative History of Amendment 2.

Dissatisfied with the give and take of the normal political process affecting anti-discrimination laws and policies, Colorado for Family Values ("CFV") proposed Amendment 2 as a ballot initiative amending the state constitution. Amendment 2 differed fundamentally from previous efforts to repeal anti-discrimination measures: it altered the jurisdiction of all governmental entities in Colorado by barring all branches and all levels of government from protecting gay people from *any* form of public or private discrimination in *any* context. In CFV's words, the purpose of Amendment 2 was to "close the lid on the entire issue of [civil rights for gay people] here in Colorado." R.15:853, J.A.182. As the Colorado Supreme Court later determined, Amendment 2 "sought to deny" the right of gay people "to participate equally in the political process." 882 P.2d at 1349, Pet. App. B-22, Pet. App. D-24-27.

In the ensuing ballot campaign, CFV relied on two arguments to persuade voters to enact Amendment 2. First, CFV portrayed all gay men and lesbians as "morally depraved" persons who undermine "traditional family values and structures." Pl.Ex. 11 at 32-33, R.6:55; Pl.Ex. 12 at 55, R.6:56. CFV's campaign brochure asserted that gay people sexually molest children as part of "homosexuals' lifestyle." Df.Ex. W (lodged concurrently with Joint Appendix) at 2, R.8:117. CFV's campaign materials sent to pastors also emphasized Biblical passages as justification for discrimination against gay people. R.8:85. CFV asserted that "gay behavior" is what the Bible calls "sin," R.16:888, Pl.Ex. 12 at 113, and that homosexuality is "an abomination" to "the authority of God." R.16:1062-63.

Second, CFV argued that laws protecting gay people from discrimination provided them with "special rights"

not available to other Colorado residents. As an officer of CFV later conceded, the phrase "special rights" was a "meaningless term" designed as a campaign slogan rather than an accurate description of Amendment 2's legal effects. R.16:879, J.A.102.[8]

C. Scope and Meaning of Amendment 2.

Amendment 2's plain language prohibits "any . . . claim of discrimination" made pursuant to "any statute, regulation, ordinance or policy" whenever the discrimination for which the claimant seeks relief is based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[9] This prohibition on remedies for discrimination is expressly unlimited. The amendment bars state and local government from prohibiting discrimination of any kind and in any context if it is based on a person's gay, lesbian or bisexual orientation – including government employment, the sale of insurance, or provision of governmental services like police protection, where government expressly prohibits arbitrary discrimination directed against other groups.

The briefs of the State and certain amici imply that Amendment 2 authorizes only discrimination by *private* actors such as private employers and landlords. *See, e.g.*, State Br. 7, Brief of Amicus Curiae Equal Rights, Not

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[8] The National Legal Foundation, an advisor to CFV, agreed that " 'No Special Privileges' [was] a good motto for the amendment's public campaign" but recommended that the phrase be removed from the text of Amendment 2 to maximize the scope of the ballot measure. R.8:78,86-88,113, J.A.102.

[9] The plaintiffs' brief uses the term "sexual orientation" to encompass Amendment 2's reference to "orientation, conduct, practices, or relationships." The Colorado Supreme Court determined that each listed characteristic "provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual." 882 P.2d at 1349, Pet. App. B-22-23.

Special Rights, Inc., 7. This mischaracterizes Amendment 2's scope. As the Colorado Supreme Court noted, relying on the fact that Amendment 2 repeals the Governor's Executive Order, Amendment 2 nullifies all laws and policies that bar *governmental* discrimination against gay people. 854 P.2d at 1284-85, Pet. App. D-24-25.

The State also implies that the Colorado Supreme Court determined only that Amendment 2 repeals existing laws. State Br. 3, citing Pet. App. D-24. The State fails to point out that the next paragraph of the court's opinion declares,

> The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

854 P.2d at 1285, Pet. App. D-25.[10] The court observed that it "need not determine what broader application Amendment 2 might have" because its interpretation provided a "sufficient basis" for its conclusion that Amendment 2 is unconstitutional. 854 P.2d at 1284 n. 25 and 1285 n. 27, and Pet. App. D-24 n. 25 and D-25 n. 27.

The State also asserts that Amendment 2 only prohibits state and local governments from providing "special rights" to gay people. According to the State, after the enactment of Amendment 2 "[i]ndividuals would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2." State Br. 6. Of

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[10] This Court "must, of course, accept the State Court's view of the purpose of its own law. . . . " *U.S. Term Limits, Inc. v. Thornton*, 63 U.S.L.W. 4413, 4428 (May 22, 1995).

course, this is not true. Prior to Amendment 2 all people had the right at all levels of government to seek protection from arbitrary discrimination. But under Amendment 2, gay people – and they alone – have no such right. Furthermore, contrary to the State's assertions, there is nothing "special" about the legislation expressly forbidden by Amendment 2. Many state and local laws provide rights to members of numerous groups to be free from arbitrary, irrational or unfair discrimination. Amendment 2, however, precludes enforcement of such laws insofar, and only insofar, as they prohibit discrimination against gay people.[11]

For instance, state law regulates the insurance industry to prevent "unfair discrimination" against any insured on any basis. C.R.S. § 10-3-1104(1)(f). Amendment 2 nullifies this statute to the extent, and only to the extent, that it prohibits discrimination on the basis of gay, lesbian or bisexual orientation. Also, state law regulates public employment to prevent all arbitrary discrimination against state employees on any basis by government. *See, e.g.*, C.R.S. § 24-50-115 (regulating dismissal of civil servants). Amendment 2 prevents application of those regulations to cases – and only to cases – of discrimination on the basis of gay, lesbian or bisexual orientation even where such discrimination is, in fact, arbitrary.

More generally, Amendment 2 bars claims made under state and local laws regardless of whether such laws mention sexual orientation as a forbidden criterion for discrimination. This is because Amendment 2 bans "any . . . claim" seeking relief from "discrimination"

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[11] The enactments that Amendment 2 repeals all refer to discrimination on the basis of "sexual orientation" or "sexual preference." Because Amendment 2 addresses only "homosexual, lesbian or bisexual orientation," the enactments remain valid to the extent that they prohibit discrimination on the basis of *heterosexual* orientation.

based on gay, lesbian or bisexual orientation.[12] For example, Colorado law prohibits as a "discriminatory or unfair employment practice" a private employer's termination of "any employee due to that employee's engaging in any lawful activity off the premises of the employer during non-working hours." C.R.S. § 24-34-402.5. Prior to the enactment of Amendment 2, all employees (including gay employees) could obtain relief under § 24-34-402.5 from an employer's discriminatory termination based on their legal off-duty conduct.

Nevertheless, Amendment 2 prevents gay people – and only gay people – from bringing "any . . . claim of discrimination" under § 24-34-402.5 for relief from discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[13] Thus,

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[12] As recently noted, the use of the word "any" in similar language in the federal Fair Housing Act renders it "difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant government restrictions that are exempt from the F.H.A." *City of Edmonds v. Oxford House, Inc.*, 63 U.S.L.W. 4402, 4406 (May 15, 1995) (Thomas, J., dissenting).

[13] Section 24-34-402.5 does not expressly create any "claim of discrimination" based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships." However, *no* state or local law in Colorado has ever made gay, lesbian or bisexual orientation or conduct a forbidden criterion *as such*: such laws mention only the more general criterion of "sexual orientation." *See* n. 11 *supra*. If Amendment 2 barred claims of discrimination only when brought pursuant to laws explicitly prohibiting discrimination on the basis of the characteristics described in the amendment, Amendment 2 would not preclude laws that the Colorado Supreme Court explicitly found to be precluded. 854 P.2d at 1284-85, Pet. App. D-24-25.

Section 24-34-402.5 forbids discrimination on the basis of a broad category (i.e., legal off-duty conduct) that subsumes a specific type of discrimination constitutionally authorized by Amendment 2 (i.e., discrimination based on "homosexual, lesbian, or bisexual . . . conduct"). In this respect, the statute is

far from preventing gay people from enjoying "special rights," Amendment 2 deprives them alone of *any* right to be free from discrimination on the basis of legal off-duty activities, a right that is extended to all other persons in Colorado.

In sum, Amendment 2 prohibits gay people from seeking or obtaining basic protections from discrimination that state and local laws routinely provide to all other persons in Colorado. And Amendment 2 extends that prohibition as far as Colorado's jurisdiction reaches – to every level and every branch of government. Accordingly, contrary to the State's argument, State Br. 34, the "breathtaking" aspect of this case is not the "sweep" or "devastating" consequences of the Colorado Supreme Court's decision, but rather of Amendment 2 itself. The amendment is unprecedented in its total elimination not only of every state-law barrier to discrimination against a targeted minority group, but also of every opportunity that group might otherwise have had to seek redress from the discrimination.

SUMMARY OF ARGUMENT

Amendment 2 singles out one group of people and forbids state or local government from taking any action to protect that group from *any* claim of discrimination based on sexual orientation. The amendment forbids such protection without qualification or limit, regardless of circumstances and regardless of whether a governmental actor or private party discriminates. The question before this Court is whether such a selective and sweeping restriction of access to protection for only one group of people denies those people equal protection of the laws. Plaintiffs submit that it does for two reasons.

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identical to laws prohibiting discrimination on the basis of "sexual orientation" and is restricted by Amendment 2 for the same reason and to the same extent. *See* n. 11 *supra*.

First, Amendment 2 deprives them of a right to participate equally in the political process and, therefore, must be subjected to strict scrutiny – a scrutiny the state concedes the amendment cannot meet. Second, even under this Court's most lenient level of equal protection scrutiny, Amendment 2 lacks the necessary rational relationship to a legitimate state purpose.[14]

This Court has held that the Fourteenth Amendment prohibits states from restructuring the political process to discriminate deliberately and substantially against particular groups. By gerrymandering the jurisdiction of all political institutions in Colorado to exclude anti-discrimination laws and policies only to the extent that they protect against anti-gay discrimination, Amendment 2 denies those people an equal opportunity for political participation. Although gay people can still cast a ballot, the value of their ballot has been substantially and unequally diminished: they alone are barred from even an opportunity to seek a type of protection available to all other people in Colorado – an opportunity to seek protection from discrimination.

The State contends that it may restructure its political process to single out a specific group for such discriminatory treatment, so long as it does not burden a "suspect class." However, this Court has held that the Fourteenth Amendment guarantees a right to equal participation in the political process for members of *all* groups, not just suspect classes. This Court has also held that normal judicial deference is inappropriate whenever government

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[14] In addition to the arguments that follow, the plaintiffs refer to and endorse the arguments set forth in the amicus brief filed by Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan. The amici argue that Amendment 2 constitutes a per se deprivation of equal protection because it strips only one group of people of all eligibility for any protection from an entire category of wrongful mistreatment – the mistreatment of discrimination.

bars members of one group from equal participation in the political process by influencing elected representatives. This is because the inequality infects the political process itself, and the Court cannot rely on the democratic process alone to redress the inequality.

The State also contends that the decision below will have "devastating" consequences by subjecting numerous state and federal laws to heightened scrutiny. However, the principle identified in the decision below applies only where state laws intentionally deprive one group of the same opportunity to seek a type of government action that everyone else is free to seek, and does so in a way that substantially degrades that group's influence in the political process. Amendment 2 is unique in having such a discriminatory purpose and effect. Indeed, the State cannot cite a single other constitutional provision which, like Amendment 2, targets one group of people and excludes this group alone from obtaining anti-discrimination protection from ordinary legislative, administrative and judicial forums to which everyone else may freely appeal.

Even if this Court declines to apply heightened scrutiny to Amendment 2, it should conclude that the amendment lacks a rational relationship to any legitimate purpose and, therefore, is invalid under even the most lenient level of judicial scrutiny. Amendment 2 is unprecedented in that it insulates against legal control or review all instances of governmental and private discrimination based on a particular characteristic, regardless of context or circumstances. Such a blanket foreclosure of responsiveness to one group's interests is rationally related to one purpose alone – the expression of antipathy toward gay people. That is not a legitimate purpose, and it cannot save Amendment 2 from the requirements of the Equal Protection Clause.

The State nevertheless offers several purposes allegedly served by Amendment 2. None are rationally

served by Amendment 2 for two reasons. First, none explain why Amendment 2 singles out gay people alone to be stripped of protection from discrimination. Second, none can explain why Amendment 2 authorizes discrimination on the basis of gay, lesbian or bisexual orientation in *every* context. Moreover, the legislative history confirms that the State's asserted purposes are mere pretext and that in fact Amendment 2 serves only the purpose of expressing hostility toward gay people.

In the end, the State can provide no plausible reason to deprive gay people and only gay people of all opportunity to seek protection from discrimination on the basis of sexual orientation, while leaving all other people fully eligible to seek such protection. The question in this case is whether state law may selectively impose such a sweeping deprivation of protection from discrimination on members of *any* group consistent with the Fourteenth Amendment's guarantee of equal protection of the laws. Whether tested under heightened scrutiny or rational basis review, such an unequal deprivation violates the Fourteenth Amendment.

ARGUMENT

I. A STATE LAW THAT SINGLES OUT GAY PEOPLE AND INTENTIONALLY DENIES THEM ALL EFFECTIVE OPPORTUNITY TO SEEK RELIEF FROM DISCRIMINATION THROUGH THE POLITICAL PROCESS REQUIRES HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Colorado Supreme Court Correctly Identified the Principles Triggering Heightened Scrutiny.

The decision below rests squarely on this Court's well-established jurisprudence protecting the right to

equal, meaningful participation in the political process.[15] This jurisprudence does not merely guarantee an equal right to cast an equally weighted ballot. Rather, the Fourteenth Amendment prohibits all efforts, both obvious and subtle, to deprive members of particular groups of fair and equal representation.[16]

1. The Fourteenth Amendment Prohibits States from Gerrymandering Governmental Structure for the Purpose of Depriving Members of Targeted Groups of Equal Participation in the Political Process.

As the Colorado Supreme Court noted, this Court has consistently applied a heightened standard of review to state laws when such laws deprive members of particular groups of equal participation in the day-to-day political process. For instance, when state laws disenfranchise a particular group, the Court applies strict judicial scrutiny. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). Similarly, the Court applies strict scrutiny to state laws that place voters in unequally populated districts and prevent them from casting equally weighted votes. *Reynolds v. Sims*, 377 U.S. 533 (1964). Likewise, the Court applies such scrutiny to laws that gerrymander the boundaries of even equipopulous districts to ensure the defeat of a political group. *Davis v. Bandemer*, 478 U.S. 109 (1986); *see also Republican Party of North Carolina v. Martin*, 980 F.2d 943,

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[15] The political process includes the legislative, executive, and other more informal processes by which government decisions of all sorts, including decisions to forbid discrimination, are made.

[16] *See also* the explanation of the fundamental right to equal participation in the political process in the Amici Curiae Brief filed by the Colorado Bar Association, et al., and numerous other state and local bar associations.

955-58 (CA4 1992), *cert. denied* 114 S.Ct. 93 (1993) (North Carolina's allocation of decision-making authority to state-wide constituency held to burden Republican Party's right to equal political participation by "diluting" its political influence at local level). The Court also strictly scrutinizes laws that deny an equal opportunity for political participation by imposing ballot access requirements that single out small parties or unpopular political groups for exclusion. *See generally Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

In all of these lines of authority, the Court has departed from the deferential standard that normally characterizes judicial review of state legislation. Viewing these cases as unconnected to any larger principle, the State does not and cannot explain this lack of deference. But, contrary to the State's view, these decisions are animated by a single common concern – a recognition of the special judicial duty to ensure to all persons regardless of their social identity equal access to the day-to-day political process.

As the Court has made clear, judicial review of state legislation normally operates under the assumption that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1883). However, the premise underlying such deference is an impartial "democratic process." *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467-70 (1982); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938); James Madison, *Federalist No. 51*, in *The Federalist Papers* (Kramnick ed. 1987); John Hart Ely, *Democracy and Distrust* 73-104 (1980). Accordingly, when the state discriminates against any

particular group in the regular processes by which voters' preferences are translated into policy choices, the Court no longer can rely on the democratic process alone to prevent arbitrary discrimination: since, by definition, such discrimination restricts the voices that can be heard in the democratic process, it "is unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring) ("distortions of the political process have special implications for attempts to achieve equal protection of the laws").

The Court's steadfast protection of the equal right to cast a ballot is not an end in itself but rather a means to protect a larger end – the "right to full and effective *participation in the political process* of [the] State's legislative bodies." *Reynolds*, 377 U.S. at 565 (emphasis added).[17] After all, equal voting rights are important primarily because they give individuals the opportunity to elect representatives who will enact and enforce laws that benefit or are favored by those individuals. As a result, even if a given state law does not directly deny the formal right to cast a ballot for officials elected from equipopulous districts, it can still unconstitutionally burden the ultimate right to equal *representation* by "consistently degrad[ing] . . . a group of voters' influence on the political process as a whole." *Davis*, 478 U.S. at 132.

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[17] *See also Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693 (1989) ("'each and every citizen has an inalienable right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be") (quoting *Reynolds*, 377 U.S. at 565); *Davis v. Bandemer*, 478 U.S. at 133 (plurality opinion) (Fourteenth Amendment is violated when there has been an "effective denial to a minority of voters of a fair chance to influence the political process"); Laurence H. Tribe, *American Constitutional Law* 1062-1153 (2d ed. 1988).

As the Colorado Supreme Court noted, the application of these general principles to Amendment 2 is best illustrated by this Court's decision in *Hunter v. Erickson*, 393 U.S. 385 (1969). 854 P.2d at 1279, Pet. App. D-14. In *Hunter*, the voters of Akron, Ohio amended the city charter to require that any fair housing ordinance enacted by the city council be approved by the electorate in a referendum. This Court held that Akron's charter amendment was invalid because it singled out legislation protecting only racial and religious minorities. The Court likened the charter amendment to vote dilution, stating that the voters of Akron could

> no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968).

Hunter, 393 U.S. at 393.

As this Court recognized, the decision in *Hunter* emerges directly out of this Court's jurisprudence in *Reynolds* and *Avery* concerning dilution of the right to vote. Together, these cases recognize that in order to have equal access to the political process, there must be equality in two respects: one must have a vote equal to the votes of other persons, and one's representatives must not be uniquely incapacitated from responding to one's vote.

Group-based discrimination in the allocation of the ballot undermines the elected official's incentives to be responsive. But group-based discrimination in the definition of the elected official's powers has a similar effect: it *requires* the official to be selectively unresponsive. In either case, laws like the charter amendment in *Hunter* effectively prevent members of the burdened group from enjoying the same access to the give and take of ordinary

government that everyone else enjoys. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).[18]

Justice Harlan's concurrence in *Hunter* highlights the Court's special duty to ensure that structural provisions of state law are even-handed and non-discriminatory. As Justice Harlan explained, the Fourteenth Amendment requires that "laws which define the powers of political institutions" be based on "neutral principles." 393 U.S. at 393-94. In determining whether such laws are based on "neutral principles," the Court has asked whether the government structure they create is "designed with the *aim* of providing a just framework within which the diverse political groups in our society may fairly compete and [is] not enacted with the *purpose* of assisting one particular group in its struggle with its political opponents." *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (emphasis added).

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[18] In *Gomillion*, this Court found that the Alabama legislature's redrawing of the boundaries of the City of Tuskegee to exclude African-American voters from the city's limits abridged their right to vote under the Fifteenth Amendment. Those voters still had the right to cast a ballot in county elections but could not vote for officers of the city from which they had been excluded. *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring). Thus, Alabama violated the African-Americans' right to vote by changing the powers of their elected representatives. Although they still could cast a ballot, the effectiveness of that ballot was diminished because the county commissioners of Macon County lacked the jurisdiction to address municipal issues of chief interest to them. *Gomillion*, 364 U.S. at 341-43. *Gomillion* addresses a claim of racial discrimination in voting under the Fifteenth Amendment, but the Court has elsewhere expressly noted that the principles developed in Fifteenth Amendment cases apply to Fourteenth Amendment claims by non-racial political groups. *Davis*, 478 U.S. at 131 n. 12; *Karcher v. Daggett*, 462 U.S. 725, 749 (1983) (Stevens, J., concurring) (noting that Fourteenth Amendment's "protection against vote dilution cannot be confined to racial groups").

Thus, bicameralism, the executive veto, and supermajority requirements for constitutional amendment are all "founded on neutral principles" even though they "may on occasion make it more difficult for minorities to achieve favorable legislation" because their purpose is not to exclude "one particular group" from access to the normal political process. *Hunter*, 393 U.S. at 394 (Harlan, J., concurring). By contrast, Akron's charter amendment was not based on such "neutral principles" because it "ha[d] the clear *purpose* of making it more difficult for *certain* racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (emphasis added). By singling out a category of legislation only to the extent that such legislation protected certain groups, the Akron charter deprived the members of the burdened groups of the equal protection of the laws.

Justice Harlan's concurrence emphasizes two essential aspects of *Hunter*. First, the Fourteenth Amendment is concerned with protecting neutrality or impartiality in the *structure* of government decision-making. This concern does not require the Court to intervene to review the adoption or repeal of specific legislation. Under *Hunter*, the voters of any jurisdiction remain completely free to adopt or repeal any specific law. 393 U.S. at 395 (Harlan, J., concurring) ("If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say.").

Second, *Hunter* requires only that the powers of government be defined impartially, not that any particular issue be delegated to any particular level of government. States remain free to exclude a category of governmental action, so long as the category is excluded equally for all groups. Such even-handed exclusion does not deprive any person of equal protection because "the political majority may *generally* restructure the political process to place obstacles in the path of *everyone* seeking to secure

the benefits of governmental action." *Washington v. Seattle School District*, 458 U.S. at 470 (emphasis added).

Gordon v. Lance, 403 U.S. 1 (1971), illustrates the distinction between exclusion of issues and exclusion of groups. In *Gordon*, this Court upheld West Virginia's mandatory referendum requirement for bonded indebtedness. Rejecting the argument that this provision was inconsistent with *Hunter*, the Court stated that West Virginia's law did not fence out any sector of the population because the referendum requirement "applied equally to all bond issues" and did not single out the issue of bonded indebtedness only to the extent that it benefitted some "independently identifiable group." *Gordon*, 403 U.S. at 5.

As *Gordon* indicates, a group is "independently identifiable" if the challenged law identifies the group in its text, singling out the group based on personal traits like age, disability, sexual orientation, or race, that are unrelated to the issue addressed by the law. Such law deprives persons of equal access to the political process if it prevents only one such group from being the beneficiary of a category of government action *that all other persons may otherwise obtain*. By contrast, if a category of government action is excluded across the board, without regard to the group protected by the action, then no one is denied an *equal* opportunity to participate in the political process because everyone is *equally* barred from obtaining the excluded category of government action.

Of course, even structural provisions that impartially exclude issues without regard to independently identifiable groups nevertheless will prevent some laws from being enacted, to the disappointment of the supporters of such laws. But, provided the category of government action is excluded across the board in a non-discriminatory manner, such supporters are not deprived of equal participation in the political process because they are not deprived of access to a category of government action

that others can obtain. *Gordon*, 403 U.S. at 5-6; *see also James v. Valtierra*, 402 U.S. 137, 142 (1971) (referendum requirement for public housing upheld that burdened "persons desiring public housing"). So long as a barrier to political participation is "non-discriminatory," such a barrier is not subject to heightened scrutiny under the Fourteenth Amendment. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (impartial ban on all write-in candidacies not subject to heightened scrutiny because it is "non-discriminatory").

In sum, judicial deference to state law is inappropriate when such law deprives an independently identifiable group of equal participation in the process by which democratic decision-making occurs. Laws defining the jurisdiction of elected officials are obviously part of this process, as *Hunter* and *Gordon* make clear. And when such laws exclude policies based on the identity of the group that is protected by such policies, then the members of the burdened group are deprived of equal representation. For the reasons stated, such deprivation warrants heightened scrutiny to effectuate the guarantees of the Equal Protection Clause.

2. The Fourteenth Amendment Does Not Afford States Unlimited Power to Discriminate In the Structure of Government Simply Because the Discrimination Targets Classes Not Deemed Suspect.

Despite *Hunter*'s plain statement to the contrary, the State contends that the Fourteenth Amendment places no restraint on the degree to which a state may restructure its government to deprive only one group of political influence, provided that the group has not been deemed a suspect class. To support this assertion, the State relies on three arguments. First, the State contends that "bedrock principles of federalism" afford it virtually unlimited authority to reallocate power among its subdivisions, and to do so discriminatorily if it chooses. State Br. 15-16.

Second, the State asserts that *Hunter* is inapplicable to race-neutral laws. State Br. 19-24. Finally, the State contends that any recognition of a right to be free of governmental structures that single out particular constituencies and subject them alone to special law-making processes would lead to the "devastating" and "sweeping" consequence of applying strict scrutiny to all federal and state legislation. State Br. 34-38. All three contentions are without merit.

a. State Allocations of Governmental Power Are Not Exempt from the Fourteenth Amendment.

Citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the State contends that states have virtually unlimited discretion to reallocate power among their political subdivisions, regardless of whether the reallocations deprive a group of an equal opportunity for political participation. State Br. 15-16. According to the State, such unlimited discretion is required by "bedrock principles of Federalism." *Id.*

However, as this Court ruled in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), *Hunter v. City of Pittsburgh* held only that the states are free to allocate power among subdivisions provided the reallocation does not otherwise burden a federally protected right. *Gomillion* expressly held that such reallocations of power could work an unconstitutional "impairment of voting rights" that could not be insulated from judicial review merely by being "cloaked in the garb of the re-alignment of political subdivisions." *Id.* at 345. Similarly, as this Court stated in both *Hunter*, 393 U.S. at 392, and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 476 (1982), the fact that a state may "distribute legislative power

as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment."[19]

b. The Right to Equal Political Access Belongs to All People, Not Just to Members of Suspect Classes.

The State contends that *Hunter* and *Washington v. Seattle School District* hold only that the Equal Protection Clause forbids the political process from being restructured to "place unusual burdens on . . . racial groups" or other suspect classifications. State Br. 23. To support this contention, the State cites *James v. Valtierra*, 402 U.S. 137 (1971).

The State misreads this Court's cases and illogically supposes that the right to equal political access belongs only to certain people or groups.[20] But of course it does not. As the Court held in *Hunter*, "the State may no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." 393 U.S.

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[19] The State relies on *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982), to support the constitutionality of Amendment 2. State Br. 32-33. However, unlike Amendment 2, the constitutional provision at issue in *Crawford* merely barred the state judiciary from providing one remedy for school desegregation. As Justice Blackmun noted in his concurrence, such a limited barrier to one judicial remedy does not "work[ ] a structural change to the political process" or deny equal access to "the process of self-government" because the political branches of government remain free to protect all groups from discrimination. *Crawford*, 458 U.S. at 546.

[20] Equal protection is a personal right and extends identically to all individuals rather than protecting particular classes or groups. *Adarand Constructors, Inc. v. Pena*, 63 U.S.L.W. 4523, 4529, 4532 (June 12, 1995).

at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. *Id.* at 391, 393. In one instance, the Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, in the other, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Id.* In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1917 (1993) (explaining similarity between city charter amendment addressed in *Hunter* and constitutional amendments like Amendment 2).

The State dismisses this discussion of vote dilution in *Hunter* in a footnote, ignoring *Hunter*'s reliance on *Avery* and *Reynolds*. State Br. 21 n. 11. The State also ignores Justice Harlan's concurring opinion that sets out a *general* "constitutional approach" to "state statutes which structure the internal governmental process." *Hunter*, 393 U.S. at 393. Justice Harlan's opinion requires that such government structure be "founded on neutral principles," not just on *race*-neutral principles. 393 U.S. at 394.

Likewise, the State ignores the fact that in *Gordon*, 403 U.S. at 5, the Court grouped *Hunter* with *Gomillion*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Carrington v. Rash*, 380 U.S. 89 (1965), all cases that concern the right to vote. If mandatory referenda were suspect only when they disadvantaged "suspect classes," *Gordon* would have cited *Hunter* for that proposition and disposed of the case summarily, because the referendum in *Gordon* did not involve a suspect classification. Instead, *Gordon* found that the mandatory referendum requirement was constitutional not because it was race-neutral,

but because it did not "fence out" *any* independently identifiable group from the political process. *Gordon*, 403 U.S. at 5.

Ultimately, the State's interpretation of this Court's precedents is based upon the following logic: because *Hunter* and *Washington v. Seattle School District* involved state or local laws that discriminated on the basis of race, these cases cannot involve discrimination that burdens a fundamental right of political participation. State Br. 21 n. 11 (*Hunter* rests exclusively on unconstitutionality of racial discrimination because of "the Court's overall analysis of race in that opinion"). The State's reasoning not only distorts what the Court said in those cases, but also is illogical. Racial discrimination and unconstitutional exclusion from equal access to the political process are not mutually exclusive; indeed, the Fifteenth Amendment requires proof of both. Of course, *Hunter* and *Washington v. Seattle School District*, like *Gomillion*, involved racial discrimination. But they did not turn on that fact alone; rather, they also rested on the ground that burdening the political participation of "any particular group" through "non-neutral[ ]" structuring of government is unconstitutional. *Washington v. Seattle School District*, 458 U.S. at 468, 470, 476, 477 n. 19; *Hunter*, 393 U.S. at 393.

In the end, the State cannot explain away the numerous cases in which this Court has applied heightened scrutiny to state action that burdened equal access to the political process but did *not* involve suspect classes. Nor can the State offer any principled basis for treating the right of equal access as being less important for some groups than others. In fact, the State can cite only one authority for the proposition that *Hunter* and *Washington v. Seattle School District* rest exclusively on the unconstitutionality of racial discrimination – this Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971). However, the State reads too much into *James*.

The plaintiffs in *James* argued for heightened scrutiny on the ground that California's mandatory referendum provision for public housing discriminated either on the basis of race or relative lack of income. 402 U.S. at 141, 144-45. In addition to denying those claims, the Court considered and rejected the view that any measure which sets up a different process for adopting legislation on a particular issue violates equal protection. 402 U.S. at 142. The vice of Amendment 2, however, is not that it creates special processes for laws on certain issues, but rather that it creates a special process for laws because they protect certain people. The argument that the plaintiffs make here was not made by the parties in *James*, and the Court did not rule on it.[21]

The State is correct that this Court's prior decisions striking down state laws similar to Amendment 2 all involved unconstitutional racial discrimination. But the State is wrong to contend that it is free to deprive members of any group of equal access to the political process so long as the group has not been determined to be a suspect class. Such a result is illogical, inconsistent with the Court's cases, and completely at odds with the basic principle justifying such heightened scrutiny: that such scrutiny is required in cases where unequal treatment of disfavored persons cannot be expected to be corrected through the ordinary political process because the inequality consists of precluding those persons from participating in that process itself.

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[21] As the Court pointed out in *Gordon*, 403 U.S. 1 (1971), a few weeks after *James*, a provision can only be said to take persons out of the process as opposed to taking issues off the table if it can be said to discriminate against a class that it identifies "independent" of the group's preferences regarding the subject it addresses. 403 U.S. at 5. By this standard, the law in *James*, which the Court found targeted only "persons desiring public housing," 402 U.S. at 142, did not target any independently identifiable group.

c. Heightened Scrutiny is Required Only Where the Discriminatory Exclusion from the Political Process Is Intentional and the Effects of the Exclusion Are Substantial.

The State contends that the Fourteenth Amendment cannot prohibit state constitutional provisions that target the interests of particular groups because any such prohibition will have "sweeping" and "devastating" consequences. State Br. 34. According to the State, the principle of impartiality in government structure recognized in the decision below would require that heightened judicial scrutiny be applied to all "routine federal and state legislation." *Id.* This is not so.

The State and amici exaggerate the reach of the decision below because they ignore the fundamental limit on the decision contained in the jurisprudence on which it is based. As explained in *Gordon* and in Justice Harlan's concurrence in *Hunter*, the Fourteenth Amendment bars only *discriminatory* laws that target particular groups. A law does not deprive anyone of *equal* protection unless it treats persons *unequally*, by forbidding laws from being enacted or applied for the benefit of some groups while allowing the same laws to be enacted and applied for the benefit of other groups. *Washington v. Seattle School District*, 458 U.S. at 474 n. 17, 480 n. 23. Therefore, if constitutional provisions are "grounded in neutral principles" and exclude issues across the board in an impartial manner, then such provisions are unaffected by the Fourteenth Amendment.

Such a doctrine concerning the gerrymandering of governmental jurisdiction is analogous to this Court's application of the Fourteenth Amendment to the gerrymandering of electoral districts or to ballot access regulations. Every arrangement of electoral districts and every ballot access regulation burdens some group of voters and candidates who would have been more successful

under a different scheme. However, such arrangements of electoral districts do not violate the Fourteenth Amendment unless they single out some political group in a discriminatory manner. *See Johnson v. De Grandy*, 114 S.Ct. 2647, 2658 (1994) (districting plan does not dilute minority's vote if it provides "equal political opportunity" even if minority voters would be more successful under a different scheme); *Davis v. Bandemer*, 478 U.S. at 131; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (heightened scrutiny does not apply if "a state election law imposes only 'reasonable, *nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters") (emphasis added).

In determining whether a particular state law discriminates against a particular group in its arrangement of the political process, it is necessary to examine both the purpose and the effect of the provision. *Davis v. Bandemer*, 478 U.S. at 127. If the provision simply has a disparate impact on the efforts of one political group and does not facially or deliberately burden that group, then it is not unconstitutionally discriminatory under the Fourteenth Amendment. *See, e.g., Davis v. Bandemer*, 478 U.S. at 127, 134, 142; *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976); *Hunter*, 393 U.S. at 394-95 (Harlan, J., concurring). Likewise, unless the discriminatory effects of a challenged law are substantial, it cannot be said to unconstitutionally burden a particular group. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (where water district has "disproportionate effect on landowners, state can deny non-landowners ballot for district's board"); *Ball v. James*, 451 U.S. 355, 371 (1981) (same); *Davis v. Bandemer*, 478 U.S. at 132 (to violate the Fourteenth Amendment, gerrymandering must "consistently degrade . . . a group of voters' influence over the political process as a whole").

These two well-established requirements of discriminatory purpose and substantial discriminatory effect eliminate the State's parade of horribles that allegedly proceeds from the decision below. For instance, the State and amici complain that "[a] vast array of federal tax, regulatory, and social legislation affects groups that are 'independently identifiable' based upon income, occupation, residence, health, age, or any number of other factors." State Br. 36; *see also* Brief Amicus Curiae of Equal Rights, Not Special Rights, Inc., 15 (innumerable constitutional provisions might "particularly affect" identifiable group).

This statement is true but irrelevant. The decision below does not apply to constitutional provisions that merely "affect" some identifiable group by imposing some disparate impact on the group. Rather, the decision below, like *Hunter*, applies only to provisions that explicitly or purposefully discriminate against a group. For example, a generally applicable restriction on bonded indebtedness (like the one in *Gordon*) may have a disparate impact on the elderly, who may depend disproportionately on public facilities. However, such a generally applicable restriction would not be subject to strict scrutiny under the decision below merely because it has a discriminatory impact.

The State and amici offer several instances of constitutional provisions that bar specific types of governmental action without regard to the beneficiaries of such action. For instance, they note that Colorado has enacted term limits for long-term incumbent government officials. State Br. 37. Contrary to the State's suggestion, however, term limits are the sort of neutral principle of government approved by Justice Harlan in his concurrence in *Hunter*.[22] The Colorado term limit does not arbitrarily

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[22] The Court adopted Justice Harlan's analysis in *Washington v. Seattle School District*, 458 U.S. at 483-84.

single out only one political group (e.g., representatives of agrarian areas or Republicans or elderly representatives) and impose term limits only on the incumbents who are members of such a group, leaving similarly situated incumbents unburdened.

The State misunderstands the decision below. The State's parade of horribles is populated by groups that it can only describe by views on or a desire to engage in activities that some state constitutions ban government from regulating. Some of these groups, the State insists, are in some way "independently identifiable." But the decision below does not apply whenever one can "identify" a group somehow disadvantaged by a limit on government power. This will almost always be possible. *See James*, 402 U.S. at 142 (group singled out was "persons desiring public housing").

Rather, the relevant question is whether *the state constitutional provision itself* identifies some group with some personal trait that is independent of the issue that the provision addresses, and gives to this group different access to the political process as to that issue. While none of the State's examples so identify and burden any group, this is precisely what Amendment 2 does.

B. The Colorado Supreme Court Correctly Determined that the Extraordinarily Discriminatory Circumstances of this Case Required Heightened Scrutiny.

The text, the legislative history, and the controlling determinations of the Colorado Supreme Court indicate that Amendment 2 is a deliberate effort to render political participation by gay people ineffective by making all levels and branches of government incapable of affording any protection from discrimination based on gay, lesbian, or bisexual orientation. Moreover, Amendment 2 has a substantial discriminatory effect on the access of gay people to the ordinary channels of political action. Under

even the most stringent application of the Court's precedents, these circumstances require that Amendment 2 be subjected to heightened scrutiny.

1. Amendment 2 Intentionally Excludes Only Gay People from Equal Opportunity to Participate in the Political Process.

There can be no question that the plain language of Amendment 2 specifically targets gay people: Amendment 2 deprives persons of any remedy for discrimination only to the extent that government or others discriminate on "the basis of" "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[23] Thus, Amendment 2 specifically bars only gay people from seeking a basic kind of "protection of the laws" that any other group is free to seek and obtain. Amendment 2 is the antithesis of a "neutral principle" described by Justice Harlan in *Hunter*.

In addition to Amendment 2's facially discriminatory application to gay people alone, the record of this case also shows that Amendment 2 was intended to render ineffective only gay persons' political efforts to seek protection against public and private discrimination. The State has candidly conceded that the purpose of Amendment 2 is to block efforts by gay voters to obtain protection from discrimination – "simply [to] close the lid on

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[23] The plaintiffs disagree with the Sixth Circuit's ruling in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (CA6 1995), for a number of reasons. The fallacies in the Sixth Circuit's approach to rational basis review are detailed in Part II, *infra*. The court's determination that gay people cannot comprise an identifiable group because sexual orientation is not a characteristic visible "on sight," *id.* at 267, ignores numerous federal, state and local civil rights laws that prohibit discrimination based on characteristics not physically apparent such as religion, marital status, veteran's status and some forms of disability.

the entire issue of [civil rights for gay people] here in Colorado." R.15:853, J.A.182.[24] This is dispositively confirmed by the determination of the Colorado Supreme Court: Amendment 2 "sought to deny [gay people's] right to participate equally in the political process." 882 P.2d at 1349, Pet. App. B-22.

2. The Burden on Gay People Is Devastating in that Amendment 2 Bans Them from Seeking Any Relief from Any Level of Government for Any Claim of Discrimination Against Them.

The discrimination authorized by Amendment 2 is astonishingly broad. Amendment 2 immunizes from all government remedy a sweeping, undefined right to discriminate on the basis of gay, lesbian, or bisexual orientation in all contexts and circumstances. Under Amendment 2, all efforts by government to protect gay people from discrimination are swept away: police regulations; state university non-discrimination policies; "just cause" safeguards for state employees; the state bar's canons of conduct for lawyers; state regulations of the insurance industry; and a multitude of other "statutes, regulations, ordinances, and policies" are all barred to the extent – and only to the extent – that they prohibit discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships." Amendment 2 insures that such policies and regulations can no longer provide any "claim of discrimination" or "protected status" against a multitude of even government actors. From the police officer who refuses to patrol

[24] The State's expert witness went further, stating that Amendment 2 served the purpose of discouraging private persons from even manifesting public support for the idea that homosexuality is a legitimate type of sexual orientation. Finnis aff. at ¶¶ 16, 17; R.18:1343.

gay neighborhoods or provide backup assistance to lesbian police officers like plaintiff Angela Romero, to the judge who decides cases based on animus toward lesbians and gay men,[25] even state actors who irrationally and maliciously discriminate based on sexual orientation are immune from state legislative, executive, administrative, or judicial remedy.

These are extraordinary and unprecedented effects. It cannot seriously be denied that excluding one group from an equal opportunity to obtain protection from discrimination constitutes a substantial discriminatory effect. In short, Amendment 2 so "consistently degrades . . . one group of voters' influence on the political process as a whole" that it unconstitutionally deprives the individual plaintiffs of an equal opportunity for political participation.

II. EVEN IF AMENDMENT 2 IS ONLY SUBJECT TO RATIONAL BASIS REVIEW, AMENDMENT 2 BEARS NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE STATE PURPOSE.

Amendment 2 is unprecedented in both the selectivity and severity of discrimination that it imposes on a particular group of persons. Never before in the history of this Court's equal protection jurisprudence has any state law ever declared that the government may not remedy "any" discrimination against a particular group, whether justified or not, whether private or governmental, in any and every context. This extraordinary removal of equal protection from the members of only one group cannot constitute "equal protection of the laws" under the Fourteenth Amendment even under the most lenient standard of equal protection review.

[25] *See* "Judge Is Censured Over Remark on Homosexuals," N.Y. Times, Nov. 29, 1989, at A28, col. 1.

A. If the Breadth and Selectivity of the Burdens Imposed by a Classification Can Only Be Explained by Antipathy Toward a Particular Group, Then the Classification Does Not Rationally Serve Any Legitimate Purpose.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Under this standard of equal protection review, the Court engages in a two-part inquiry: the Court asks first whether a classification is intended to serve a legitimate state purpose, and second, whether the classification is rationally related to that purpose.

The State argues in its brief that Amendment 2 serves several legitimate purposes. None of those asserted purposes is rationally advanced by Amendment 2, and none of them can mask its true purpose: to harm a politically unpopular group. Before canvassing the State's asserted purposes, however, it is important to review two general principles for assessing their validity.

First, in assessing whether a purpose is legitimate, this Court consistently has held that antipathy arising out of hostility or groundless stereotypes is not a legitimate purpose justifying a law under the Equal Protection Clause. Accordingly, the Court presumes that a state law is valid only "absent some reason to infer antipathy." *F.C.C. v. Beach Communications*, 113 S. Ct. 2096, 2101 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). As this Court stated in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "[p]rivate biases may be outside the reach of the law, but *the law cannot, directly or indirectly, give them effect*" (emphasis added). This Court repeatedly has asserted that antipathy, by itself, is not a legitimate purpose even for non-racial discrimination. *See, e.g., Cleburne*, 473 U.S. at 447-48; *Moreno*, 413 U.S. at 534 ("a bare . . . desire to

harm a politically unpopular group cannot constitute a *legitimate* government interest") (emphasis in original).

If bare antipathy toward a group could justify discrimination against that group, then the requirements of the Equal Protection Clause would be meaningless. By definition, every classification serves the purpose of discriminating against the group that the classification burdens. Therefore, if the "rational basis" test has any content whatsoever, it cannot permit discrimination solely for discrimination's sake.

In determining whether a classification illegitimately imposes discrimination against the members of a group as an end itself, one important consideration is the breadth of the discrimination imposed.[26] If the legal classification insulates from legal remedy public or private discrimination against some group without limitation or qualification, then it is impossible to attribute any purpose to the classification apart from a generalized desire to discriminate. By its terms, such indiscriminate imposition of burdens reveals no attempt to draw a distinction in pursuit of some specific policy: rather, such a law declares a characteristic to be sufficient justification for discrimination regardless of any specific purpose. Such discrimination for the sake of discrimination is illegitimate. *See Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1027-33, 2 Cal. Rptr. 2d 648, 656-60 (Cal. App. 1991).

Second, it is not enough that a classification has an *incidental* tendency marginally to advance a legitimate purpose; rather, there must be some plausible justification for the particular classification selected and some reasonable expectation that the classification will in practice achieve the purpose. *See Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993) (to be rational, a classification "must find some footing in the realities of the subject addressed");

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[26] *See* Brief of Amici Curiae, State of Oregon, et al. at 11-16.

James v. Strange, 407 U.S. 128, 140 (1972) (equal protection requires "rationality in the nature of the class singled out"). For instance, a state law stripping all lesbians of their drivers' licenses would advance an interest in reducing traffic congestion, and reducing the number of drivers on the road is a legitimate state purpose. However, because the purpose does nothing to explain the law's particular selectivity – why lesbians rather than a more general group have been singled out to lose their drivers' licenses – the purpose cannot justify such a burden on lesbians alone.

This is not to say that states may not pursue a legitimate goal in an incremental fashion, "step by step . . . adopting regulations that only partially ameliorate a perceived evil." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In contexts like public benefits legislation or economic regulation, where the legislature is faced with a continuum of activity that differs only by slight degrees, the legislature "must necessarily engage in a process of line-drawing." *F.C.C. v. Beach*, 113 S. Ct. at 2102.[27] This Court will not strike down such "regulatory line-drawing" if selectivity is only the incidental result of the need to draw some line among similarly situated persons. *Id.* However, the Fourteenth Amendment requires that the selectivity be justified by some legitimate purpose such as the practical difficulty of drawing a less arbitrary line. If drawing a less selective, less arbitrary line would be easy such that the selectivity is inexplicable except as

[27] The cases in which the Court has deferred to state classifications as constituting legitimate attempts to pursue a goal "one step at a time" have involved economic regulations, tax measures, or distribution of social welfare benefits. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). The Court repeatedly has noted the extraordinary deference with which such legislation governing "economics and social welfare" is treated. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

antipathy toward a disfavored group, then the classification violates the Equal Protection Clause.

B. None of the State's Proffered Interests Bears a Rational Relation to Amendment 2.

The State proffers six purposes (under three headings) that are allegedly served by Amendment 2: (1) the protection of religious freedom; (2) the protection of associational privacy; (3) the protection of the "integrity" of civil rights laws; (4) the promotion of uniform civil rights laws; (5) the protection of parental ability to inculcate their children with traditional moral values; and (6) the "deterrence of factionalism."[28]

In justifying Amendment 2 as a good-faith effort to advance these purposes, the State paints a distorted picture of the amendment as a benign and libertarian "shield" barring intrusive regulations of private persons. Amendment 2 is nothing of the sort. It is a "sword" that strips only one group of persons of protection from governmental and private discrimination. As explained below, Amendment 2's selective imposition of burdens is not a good-faith attempt to draw a line that incidentally burdens gay people. Rather, Amendment 2's selectivity can be explained only by the illegitimate purpose of targeting gay people based on antipathy and stereotypes.

1. Amendment 2 Is Not Rationally Related to Any Legitimate Interest in Religious Freedom or Associational Privacy.

The State characterizes Amendment 2 as a rational way to protect "core religious values" and associational privacy. State Br. 45. These interests, however, cannot

[28] *See* Brief Amicus Curiae of the American Bar Association for analysis of other purposes proffered by the State at earlier stages of this case.

explain either Amendment 2's sweeping ban on protection or its selective concentration of burdens on one group.

There is no dispute that Amendment 2 bans policies that forbid governmental discrimination. Yet government must operate on purely secular motives and has no legitimate interest in engaging in religiously motivated discrimination. Allowing the Denver police department, state judges, government supervisors, or other state actors to discriminate on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships" does not legitimately advance religious liberty.

Amendment 2's scope is so sweeping that it is implausible to surmise that it was intended as even a "rough accommodation" of individual freedom. Neither the government nor any of its officials or agents may act upon "religious" views about gay people, nor have they any constitutional right to association. Thus, even the most expansive claims for the protection of religious liberty and associational privacy do not provide any reason for prohibiting remedies for governmental discrimination. Given that "a more precise and direct classification is easily drawn," *Williams v. Vermont*, 472 U.S. 14, 23 n. 8 (1985), Amendment 2's total elimination of all protection from even governmental discrimination is not a good-faith effort to accommodate religious liberty or associational privacy.

This lack of a good-faith, plausible relationship between Amendment 2 and individual freedom is reinforced by the amendment's selectivity. Amendment 2 eliminates all protection from discrimination on the basis of gay, lesbian, and bisexual orientation even when other persons' individual freedom is plainly not at stake – but it leaves in place laws prohibiting discrimination based on numerous other characteristics such as marital status and

any legal off-duty conduct that implicate religious and associational freedom no less than any law excluded by Amendment 2.[29] Amendment 2's indifference to religious liberty and associational freedom except when pursued at the expense of gay people indicates that protection of such freedoms is a pretext for hostility and bias, not a rationally attributable purpose.

2. Amendment 2 Is Not Rationally Related to Protecting the Integrity of Civil Rights Laws.

The State argues that anti-discrimination laws that protect gay people from discrimination divert governmental resources from the more urgent goal of protecting "suspect classes" from discrimination. Therefore, according to the State, eliminating all such protection for gay, lesbian, and bisexual persons protects the "integrity" of civil rights laws. State Br. 41-42. This is not a serious contention.

Again, Amendment 2 sweeps so far beyond the State's proffered interest that the interest can only be a pretext. Amendment 2 eliminates laws prohibiting *governmental* discrimination based on gay, lesbian, or bisexual orientation. But requiring government to *refrain* from invidious discrimination does not consume governmental resources. Moreover, many of the laws eliminated by

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[29] Testimony at trial indicated not a single instance in which religious liberty had ever been burdened by Colorado laws or ordinances forbidding discrimination on the basis of sexual orientation. R.16:1075; Durgin aff. at ¶ 22; R.19:1350. The State's reliance on Artine Yapoujian's affidavit to establish the contrary proposition is curious, given that Yapoujian, an employer who fired a gay employee, testified that he had no objection to homosexuality. Yapoujian aff. at ¶ 10; R.18:1343.

Amendment 2 are *privately enforced*: they divert no government resources away from the protection of "suspect classes."

More important than these flaws with the State's argument, however, is the State's complete failure to provide any plausible explanation for Amendment 2's selectivity. Amendment 2 allows state and local law to protect a multitude of groups from discrimination that are not "suspect classes": state and local laws currently prohibit discrimination on the basis of marital status, veteran's status, and *any* legal off-duty conduct like smoking. Amendment 2 even allows local governments to continue to protect persons from discrimination on the basis of heterosexuality. Nothing in the State's proffered purpose explains why the preservation of state resources requires that gay people be denied all protection from discrimination on the basis of their sexual orientation, while everyone else – from smokers to heterosexuals to divorcees – may continue to be protected.

The State seems to assume that, because Amendment 2 could (in theory) conserve resources for legitimate goals like protection of "suspect classes," Amendment 2 therefore serves a legitimate purpose in a rational manner. However, unless the proffered purpose can explain Amendment 2's selectivity, it provides no rational justification for Amendment 2. Otherwise, state law could always selectively withdraw any governmental service or protection from any set of individuals. For instance, the State's logic would permit state law to bar gay people from receiving police protection in their neighborhoods,[30] on the theory that elimination of such protection would save government resources which could then be devoted to the better protection of "suspect classes." Of course,

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[30] This is not an unimaginable scenario; the Denver Police Department's regulations barring such discrimination against gay people would be nullified by Amendment 2.

such selective withdrawal of governmental protection would be unconstitutional for the same reason that Amendment 2 is unconstitutional – because, like Amendment 2, it singles out gay people for discriminatory treatment without justification for such selectivity.

The State contends that singling out gay people serves a legitimate purpose because "special protection for suspect and other needy classes should not give way to the demands for inclusion of a politically powerful and relatively privileged special interest group." State Br. 42. The contention is both untrue and irrelevant. To justify the selectivity of Amendment 2's classification, one must assume that gay people are less worthy of protection from discrimination not only than "suspect classes" but also than *every* other conceivable group of people, because all such groups are protected from discrimination in at least some contexts and all can obtain such protection without amending the state constitution.

Such an assumption lacks any "footing in the realities of the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. As Judge Posner has noted:

> [I]s there any reason to exclude homosexuals from a protected category that already includes not only racial, religious, and ethnic groups but also women, the physically and mentally handicapped, all workers aged 40 and older, and, in some cases, even young healthy male WASPs? Is there less, or less harmful, or less irrational discrimination against homosexuals than against the members of *any* of these other groups? The answer is no.

Richard Posner, *Sex and Reason* 323 (1992) (emphasis in original). Because the State's purpose of preserving the integrity of civil rights law does nothing whatsoever to explain Amendment 2's selectivity, it cannot provide a rational basis for the amendment.

3. Amendment 2 Is Not Rationally Related to the Creation of Uniform Civil Rights Laws.

The State contends that Amendment 2 promotes state-wide uniformity of civil rights laws, "thereby providing greater economic and legal predictability in [business] affairs." State Br. 47. Once more, however, the State fails to explain either Amendment 2's scope or its selectivity. Amendment 2 eliminates even state-wide statutes such as laws prohibiting arbitrary discrimination in insurance. Had the purpose of Amendment 2 been concerned at all with uniformity, it would have been an easy matter to exclude from its scope all state-wide laws protecting gay people from discrimination.

Again, the selectivity of Amendment 2 indicates that it cannot plausibly be read as a good-faith effort to achieve state-wide uniformity concerning civil rights. While eliminating uniform state laws that protect gay people, Amendment 2 tolerates any degree of disuniformity in local anti-discrimination laws so long as the laws provide no relief from discrimination based on gay, lesbian, or bisexual orientation. Both Amendment 2's selectivity and severity, in short, indicate that promotion of uniformity is but a pretext, a goal about which the State is utterly indifferent except as a cover for burdening gay people.

4. Amendment 2 Is Not Rationally Related to the Purpose of Inculcating Children with "Traditional Moral Values."

The State argues that Amendment 2 advances the goal of "familial privacy" by assisting "the efforts of some parents to teach traditional moral values."[31] State Br. 46. According to the State, anti-discrimination laws

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[31] Of course, no one has a privacy interest in ensuring that government endorses their point of view. *Block v. Meese*, 793 F.2d 1303, 1312-14 (CADC 1986) (per Scalia, J.).

forbidding arbitrary discrimination on the basis of sexual orientation implicitly endorse homosexuality. *Id.* Therefore, the State argues that by forbidding such laws and their alleged message that "traditional and alternative families" are morally and socially equivalent, Amendment 2 assists parents in their efforts to convey traditional values to their children. *Id.*

This argument is based on the erroneous premise that government "endorses" lesbian, gay, or bisexual orientation by forbidding discrimination on the basis of sexual orientation in certain governmental or commercial contexts. By the State's reasoning, when government forbids private employers from discriminating against Buddhists on the basis of their Buddhism, it endorses Buddhism and prevents parents from inculcating their children with non-Buddhist religious principles. Such reasoning would render much of federal anti-discrimination law an unconstitutional establishment of religion. *But see Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (explaining why much federal anti-discrimination law, including that banning religious discrimination by employers in interstate commerce, does not endorse religion in violation of First Amendment's Establishment Clause). As the Colorado Supreme Court noted, the State's analysis of anti-discrimination law is specious. Anti-discrimination laws "make no assumptions about the morality of protected classes – they simply recognize that certain characteristics, be they moral or immoral, have no relevance in enumerated commercial contexts." 882 P.2d at 1347, Pet. App. B-19.

The Court need not decide whether preservation of traditional sexual morality can be a legitimate purpose for a legislative classification.[32] Amendment 2 is far too

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[32] This Court's holding in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) provides no support for the State. *Bowers* held only that the "presumed belief of a majority . . . that homosexual

broad to be a rational means of preserving traditional sexual morality. Amendment 2 insulates discrimination on the basis of gay, lesbian, and bisexual orientation from "any" remedy under "any" law, even if such discrimination is unrelated to sexual conduct or sexual mores. It defies even the lenient standards of the "rational basis" test to argue that traditional sexual morality is protected by barring remedies for discrimination by police officers and insurers.

5. Amendment 2 Is Not Rationally Related to any Legitimate Purpose of Deterring Factionalism.

The State contends that Amendment 2 serves the legitimate purpose of deterring "factionalism" because it "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." State Br. 47. The State's argument is without merit. The "deterrence of factionalism," as defined by the State, is not a legitimate purpose.

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sodomy is immoral and unacceptable" could provide a rational basis for a statute criminalizing a type of sexual conduct. *Id.* at 196. But, even if an interest in preserving traditional sexual morality can justify state laws that actually regulate sexual conduct, such an interest cannot justify Amendment 2's blanket authorization of *all* discrimination against a class of people, even discrimination in contexts that are unrelated to sexuality or sexual conduct. (It should be noted that Colorado law does not criminalize sodomy.) Moreover, even if protection of morality is a legitimate purpose as a general matter, a moral precept that is nothing more than antipathy toward one group cannot justify discrimination. *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534; *see* John Higham, *Strangers in the Land: Patterns of American Nativism*, Rutgers Univ. Press (1988) 26-27, 66-67, 92, 160 (Irish, Catholics and Jews characterized by some Americans as inherently morally deficient).

Amendment 2 supresses "factionalism" only by suppressing one side of political debate. But, "factionalism" is the foundation of political democracy; it is precisely the sort of debate protected by the Equal Protection Clause and the First Amendment that the State has no legitimate interest in suppressing. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2547 (1992) (First Amendment does not permit city "to impose special prohibitions on those speakers who express views on disfavored subjects"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) ("there is no significant state or public interest in curtailing debate and discussion of a ballot measure"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored *or more controversial views*") (emphasis added).

C. The Selectivity, Severity and Legislative History of Amendment 2 Demonstrate that Its Burdens on Gay People Can Only Be Attributable to Antipathy, an Illegitimate State Purpose.

The issue in this case is not whether it might be rational to discriminate on the basis of sexual orientation in some specific context for some specific legitimate purpose. The Court can and should leave for another day the question of whether some legitimate purpose can justify such limited discrimination. Rather, the question in this case is whether there is a rational basis for constitutionally insulating every type of public and private discrimination against gay people in every context from any remedy, regardless of the circumstances or purposes of such discrimination. Amendment 2 provides blanket immunity for discrimination based on gay orientation. Therefore, in order to uphold Amendment 2, the Court would have to find that such orientation is always a rational basis for any sort of discrimination.

Such a holding, like Amendment 2 itself, would be unprecedented: *no* classification, however rational in some circumstance, is *always* a rational basis for discrimination. Rather, the foundation of the "rational basis" test is that law-makers and enforcers ought to possess the flexibility to determine the specific circumstances under which some non-suspect classification might be prudently employed. *Cleburne*, 473 U.S. at 445. Amendment 2 rejects all such flexible and nuanced approaches and declares that gay orientation is always, in effect, a rational basis for discrimination. Such a sweeping law cannot be explained by any specific interest in pursuing some specific policy. Rather, a blanket prohibition on protection in every context, even unforeseen, indicates only a purpose to engage in discrimination for discrimination's sake. As explained above, such a purpose is not legitimate under the Equal Protection Clause.

Amendment 2's legislative history amply confirms its illegitimate purpose of giving legal effect to antipathy toward gay people. *See Cleburne*, 473 U.S. at 453 n. 6 (Stevens, J., concurring) (if classification motivated by antipathy, plausibility decreases that classification is legitimate effort to address problem incrementally). That antipathy was made explicit by the campaign materials distributed by the amendment's sponsor. CFV promoted Amendment 2 on the eve of the election by distributing to 800,000 households in the state a brochure making the baseless accusation that "[s]exual molestation of children is a large part of many homosexuals' lifestyle – part of the very lifestyle 'gay-rights' activists want government to give special class, ethnic status!" Df.Ex. W (lodged concurrently with Joint Appendix) at 2; R.15:735.[33]

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[33] Gay men and lesbians are stereotyped frequently but erroneously as child molesters. R.6:105. A study of 269 perpetrators of sexual assaults on children in Denver during the two years before Amendment 2's passage found that all but two of the assaults were committed by people identified as heterosexual. R.14:679-86.

Much of the material about gays as pedophiles, used in the anti-gay rights initiatives across the country, was generated by the Family Research Institute and its founder, Paul Cameron, a psychologist. *See* amicus curiae brief filed by FRI on May 4, 1994 in Colo. Sup. Ct. at 3,17,20,25. Cameron has been sanctioned by the American Psychological Association, the American Sociological Association, and the Nebraska Psychological Association for unethical conduct and the misuse of data. R.6:93; 8:88; 13:281,284. CFV officials acknowledged both their reliance on Cameron's research and their knowledge that Cameron had been sanctioned. R.15:773-79; 16:1053.

As the Court has noted, a classification's selectivity must be assessed according to "the realities of the subject addressed by the legislation." *Heller*, 113 S. Ct. at 2643. Here, the realities are that all of the claimed justifications for this amendment are makeweight. Its real purpose is the effectuation of hostility and antipathy toward an unpopular group.

By whatever standard the Court judges such an amendment, Amendment 2 cannot survive the requirements of the Equal Protection Clause.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.[34]

Respectfully submitted,

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[34] If this Court reverses the judgment of the Colorado court, the case should be remanded for consideration of the issues that the district court did not address, including the plaintiffs' claim that Amendment 2 violates the First Amendment.

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Supreme Court, U.S.
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No. 94-1039

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE *HUNTER* EXCEPTION IS LIMITED TO RACIAL CLASSIFICATIONS	2
II. NOTHING WARRANTS OVERRULING *JAMES* AND BROADENING THE *HUNTER* EXCEPTION	6
III. AMENDMENT 2 RATIONALLY SERVES LEGITIMATE STATE ENDS	14
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Adarand Constructors, Inc. v. *Peña*, 115 S. Ct. 2097 (1995)	5
Arthur v. *City of Toledo*, 782 F.2d 565 (6th Cir. 1986)	15
Barnes v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)	16
Board of Estimate of New York v. *Morris*, 489 U.S. 688 (1989)	6
Burdick v. *Takushi*, 504 U.S. 428 (1992)	19
Carrara Place, Ltd. v. *Arapahoe County Bd. of Equalization*, 761 P.2d 197 (Colo. 1988)	9
Cipriano v. *City of Houma*, 395 U.S. 701 (1969)	6
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)	14, 18, 19
City of Eastlake v. *Forest City Enters.*, 426 U.S. 668 (1976)	5
City of Mobile v. *Bolden*, 446 U.S. 55 (1980)	15
Crawford v. *Los Angeles Board of Educ.*, 458 U.S. 527 (1982)	10, 15, 16, 18
Dandridge v. *Williams*, 397 U.S. 471 (1970)	18
Davis v. *Bandemer*, 478 U.S. 109 (1986)	4, 6
Equality Found., Inc. v. *City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995)	11, 14
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975)	8
Eu v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)	19
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960)	3
Gordon v. *Lance*, 403 U.S. 1 (1971)	3
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	2
Gustafson v. *Alloyd Co.*, 115 S. Ct. 1061 (1995)	9
Heller v. *Doe*, 113 S. Ct. 2637 (1993)	16
Howlett v. *Rose*, 496 U.S. 356 (1990)	7
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)	17
Hunter v. *Erickson*, 393 U.S. 385 (1969)	2
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991)	7
Illinois State Bd. of Elections v. *Socialist Workers Party*, 440 U.S. 173 (1979)	4

TABLE OF AUTHORITIES—Continued

	Page
James v. *Valtierra*, 402 U.S. 137 (1971)	3
Jefferson v. *Hackney*, 406 U.S. 535 (1972)	18
Kolender v. *Lawson*, 461 U.S. 352 (1983)	8
621 (1969)	4, 6
Kramer v. *Union Free Sch. Dist. No. 15*, 395 U.S.	
Nordlinger v. *Hahn*, 505 U.S. 1 (1992)	6, 12
Ohio v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990)	7
Reynolds v. *Sims*, 377 U.S. 533 (1964)	4, 6
Rust v. *Sullivan*, 500 U.S. 173 (1991)	7
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973)	5, 16
Storer v. *Brown*, 415 U.S. 724 (1974)	19
Town of Lockport v. *Citizens for Community Action at Local Levels, Inc.*, 430 U.S. 259 (1977)	4
United States R.R. Retirement Bd. v. *Fritz*, 449 U.S. 166 (1980)	15
U.S. Term Limits, Inc. v. *Thornton*, 115 S. Ct. 1842 (1995)	10
Union Ins. Co. v. *Hoge*, 62 U.S. (21 How.) 35 (1858)	8
United States v. *Salerno*, 481 U.S. 739 (1987)	1, 7
Vance v. *Bradley*, 440 U.S. 93 (1979)	1, 17
Washington v. *Davis*, 426 U.S. 229 (1976)	12
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 473 (1982)	3
Williamson v. *Lee Optical, Inc.*, 348 U.S. 483 (1955)	19

STATUTES

Colo. Const. art. V, § 1(2)	5

OTHER AUTHORITIES

Council of State Governments, *The Book of the States* (1994)	5
John H. Ely, *Democracy & Distrust* (1980)	13
Gerald Gunther, *Constitutional Law* (12th ed. 1991)	13
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988)	8
Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976)	13

REPLY BRIEF OF PETITIONERS

Stripped of rhetoric, Respondents' arguments present two themes: (1) the Court should overrule *James* v. *Valtierra* and extend beyond race the narrow *Hunter* exception to rational basis review of internal state government restructurings; and (2) Amendment 2 fails rational basis review—that is, Amendment 2 "is so unrelated to the achievement of *any combination* of legitimate purposes that [the Court] can *only* conclude that the [Colorado voters'] actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) (emphasis added).

Respondents' arguments fail because they are premised not upon law, but rather upon a parade of horribles derived from imagined interpretations and applications of Amendment 2. In following this approach, Respondents have simply ignored the *facial* nature of their challenge—Amendment 2 has *never* been applied, much less in the extreme manner hypothesized by Respondents. Amendment 2 is facially valid so long as at least *some* of its applications would be constitutional, *see, e.g., United States* v. *Salerno*, 481 U.S. 739, 744-45 (1987); Respondents' concern that Amendment 2 *might* be misused can be addressed only in the context of an "as applied" challenge by an affected individual.

All that is at issue here is whether Coloradans can divest their elected representatives of authority to deal with a particular *issue*—protections for homosexuals and bisexuals that go beyond those afforded by federal law—and instead insist that this question of public policy be resolved solely by the people on a statewide basis. Under the established jurisprudence of this Court, which stands on bedrock principles of federalism, such ordering of a State's internal affairs is subject to heightened scrutiny in a federal equal protection challenge *only* if it classifies on the basis of race or infringes a fundamental constitutional right. Amendment 2, which furthers numerous legitimate—even compelling—state purposes, infringes no

fundamental right, and Respondents unequivocally disavow any reliance here on suspect class.[1] Under settled law the judgment below must be reversed.

I. THE *HUNTER* EXCEPTION IS LIMITED TO RACIAL CLASSIFICATIONS.

Far from effectuating a sweeping reworking of the American political process, *Hunter* v. *Erickson*, 393 U.S. 385 (1969), established a narrow exception to the traditional rules of judicial restraint that apply to federal equal protection challenges to a State's structuring of its own government. The *only* area where this Court has condoned close scrutiny of such state decisions is in the context of race. But the exceptional judicial review engendered by racial classifications cannot lead to the conclusion that every restructuring of state government, regardless of the group affected, is inherently suspect. To the contrary, recognizing the "unique nature of state decisions that 'go to the heart of representative government,'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), this Court has steadfastly applied the opposite presumption.[2]

A. Respondents simply ignore the overriding importance of race in *Hunter*,[3] *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982) and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).[4] More fundamentally, Respondents do nothing to explain why *James* v. *Valtierra*, 402 U.S. 137 (1971), does not control this case. In *James*, this Court expressly rejected Respondents' argument that the *Hunter* exception should be extended beyond race. *See* 402 U.S. at 139. Contrary to Respondents' position, it is no answer to declare that the privilege of strict scrutiny is "limited" to those groups that are "independently identifiable."[5] Certainly, the poor are as readily identifiable a group as homosexuals and bisexuals. *See James*, 402 U.S. at 139; *id.* at 144-45 (Marshall, J., dissenting) ("[i]t is rather an explicit classification on the basis of poverty").

Respondents attempt to glean support for the doctrinal expansion they seek by noting that this Court also engages in close scrutiny of state laws that disenfranchise, dilute votes, limit ballot access, or gerrymander, even when no racial lines are drawn. In each of those areas, however, the Court's exacting examination expressly rested on the State's infringement of one or both of the established

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[1] The trial court considered and rejected Respondents' suspect class claim, Pet. App. C-14 to C-19, and certified its *judgment* (encompassing all subsidiary rulings) for appeal under Colo. R. Civ. P. 54(b). J.A. 267-68; Pet. Opp. 4, 14-15. Respondents did not appeal, and thus the suspect class issue is not merely absent here; it can never be a part of this case.

[2] Respondents attack a straw man in arguing that state allocations of governmental power are not *exempt* from the Fourteenth Amendment. *See* Resp. Br. 24-25. Petitioners argue—as this Court has consistently held—that the *level* of "scrutiny 'will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.'" *Gregory*, 501 U.S. at 469.

[3] Justice Harlan's concurrence, like the *Hunter* majority, focused on the racial nature of the classification at issue and never suggested that strict scrutiny be extended to non-suspect classes. *See* 393 U.S. at 394-95. And the only portion of Justice Harlan's analysis adopted by the Court in *Washington* was his conclusion, with which petitioners have no quarrel, that "the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation 'arouses passionate opposition.'" *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 473, 483 (1982) (*quoting Hunter*, 393 U.S. at 395 (concurring opinion)). In any event, Justice Harlan voted with the *majority* in *James* v. *Valtierra*.

[4] *See* Pet. Br. 21-23 & n.12; *Gomillion*, 364 U.S. at 341 ("the legislation is solely concerned with segregating white and colored voters"). *See also James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (expressly distinguishing *Gomillion* as a race case).

[5] Respondents get no support from *Gordon* v. *Lance*, 403 U.S. 1 (1971). The popular referendum in *Gordon*—which like that in *James* did not involve race—required super-majoritarian approval of increases in bond indebtedness or state tax rates. In *upholding* that requirement, the Court held that it "single[d] out no discrete and insular minority for special treatment." *Gordon*, 403 U.S. at 5. Thus, the *holding* in *Gordon* clearly supports Petitioners' position.

fundamental rights of voting and political association.[6] Neither fundamental right is implicated here—no citizen has been disenfranchised, prevented from casting an equally weighted vote, or in any way hindered in electing the representative of his or her choice by Amendment 2. Indeed, it is difficult to comprehend how allowing every voter a direct voice on an *issue*, rather than filtering the issue through representatives, denies political participation rights. As the Court has explained:

> The equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a "single-shot" referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives—instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters.

Town of Lockport v. *Citizens for Community Action at Local Levels, Inc.*, 430 U.S. 259, 266 (1977). Respondents lost a political battle, but they are free to fight it again without any restriction on their voting rights.[7]

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[6] *See, e.g., Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Davis* v. *Bandemer*, 478 U.S. 109, 118 (1986).

[7] Respondents remain free to seek local and state legislation on anything other than quota preferences and the other special protections addressed by Amendment 2. Further, because the votes of Respondents and their supporters continue to count as much as anyone else's vote, elected representatives obviously will not suddenly ignore all of the concerns of thousands of voters. And even on the single issue addressed by Amendment 2, those favoring legislative control of anti-discrimination issues retain an avenue to have their views adopted—Amendment 2 may be modified or repealed by a simple majority vote of the electorate. Respondents suggest that popular amendment of state constitutions is extraordinary, but in truth it is commonplace and an integral part of the normal political process—from 1986 through 1993, for example, 1007 state constitutional amendments were proposed, of which 708 (70.3%) were adopted. *See* Council of State Governments, *The Book of the States* 2 (1994). Colorado has amended its constitution 124 times since statehood. *Id.* at 19.

B. In the absence of any existing, relevant fundamental right, Respondents would have the Court create a *new* fundamental right of certain groups to demand that the people place no limits on the policies that their elected representatives can legislate. Given the strong presumption against the creation of new rights,[8] the oddity of a fundamental constitutional right that accrues not to all individuals, but only to favored groups,[9] and the inherent implausibility of the idea that the Framers of the Constitution intended to abolish the people's right to delimit the authority of their representatives,[10] it is not surprising that Respondents' approach finds no support in any of this Court's prior decisions.[11]

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[8] *See San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws").

[9] *See Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2112 (1995) ("the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*").

[10] *See City of Eastlake* v. *Forest City Enters.*, 426 U.S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature"); Colo. Const. art. V, § 1(2) ("[t]he first power hereby reserved by the people is the initiative").

[11] Respondents and their *amici* cannot disguise the radical departure from established equal protection jurisprudence they propose by citing "neutral principles." Neutrality is of constitutional significance only in determining the existence or nonexistence of "invidious"—*i.e.*, suspect class—discrimination by a challenged law. Any broader conception of neutrality would be flatly inconsistent with *James*, which upheld as rational a popular referendum with the clear purpose of making it more difficult for the poor to obtain favorable legislation. If there is no suspect class or fundamental

Respondents seek comfort in the Court's references to "an inalienable right to full and effective participation in the political processes," *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964), only by ignoring that the "political processes" to which the Court was referring were the "processes by which candidates are nominated and elected." *Davis* v. *Bandemer*, 478 U.S. 109, 137 (1986).[12] Outside the context of race, this Court gives close scrutiny only to those internal state structures that infringe the right to *select* elected representatives, and *not* to those that merely affect the powers of those representatives once elected.[13] In sum, Amendment 2 infringes no fundamental right, and Respondents' position thus stands or falls on the propriety of overruling *James* and extending *Hunter* beyond the unique context of race.

II. NOTHING WARRANTS OVERRULING *JAMES* AND BROADENING THE *HUNTER* EXCEPTION.

Respondents offer two reasons for ignoring *James*: (1) their claim—supported by a parade of horribles—that unless the Court facially invalidates Amendment 2, homosexuals and bisexuals will be deprived of all legal redress for every conceivable wrong; and (2) arguments that the Court can sidestep *James* without revolutionizing its equal protection jurisprudence and fundamentally redefining federal-state relations. Neither contention has merit.

A. Respondents speculate that Amendment 2 could deprive homosexuals and bisexuals of legal redress for any possible wrong done to them by government or private

right involved, and the State's classification is rational, a lack of "neutrality" is utterly beside the point. *See, e.g., Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications").

[12] *See also Board of Estimate of New York* v. *Morris*, 489 U.S. 688, 692 (1989); *Reynolds*, 377 U.S. at 565.

[13] *See Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969) ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not"); *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969).

citizens. *See* Resp. Br. 34-35; Br. for *Amicus Curiae* Nat'l Bar Ass'n 3. The State's consistent position and the record below dispel any notion that Amendment 2 was intended to, or by its terms would accomplish, such a result. More fundamentally, even if putative concerns about police protection, public benefits, library services, and judicial indifference did not overlook the existence of the Fourteenth Amendment and the Supremacy Clause, *see, e.g., Howlett* v. *Rose*, 496 U.S. 356, 369-71 (1990) (state courts cannot refuse to entertain a federally mandated cause of action),[14] these extreme applications of Amendment 2 are wholly irrelevant to this *facial* challenge.

Outside the limited context of the First Amendment (with its unique overbreadth component), a party seeking facial invalidation of a statute cannot rely upon extreme hypotheticals that may never occur but instead "must establish that *no* set of circumstances exists under which the Act would be constitutional." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Speculation that Amendment 2 *might* operate unconstitutionally in some conceivable circumstances therefore does nothing to advance Respondents' case for facial invalidation. *See, e.g., Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur"). Rather, those concerns can be addressed only in future "as applied" challenges, if and when the applications Respondents fear ever occur.[15]

[14] The repeal of special protections for homosexuals and bisexuals plainly will not deprive anyone of basic police services. The duty of the police to protect citizens arises out of their public office and not from anti-discrimination laws which have never been extended to all citizens. Any concern that Amendment 2 might actually be construed to sanction police discrimination ignores both the State's consistent construction and the Fourteenth Amendment, which protects all persons, regardless of group affiliation, from arbitrary, irrational government actions.

[15] *See, e.g., INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991); *Rust* v. *Sullivan*, 500 U.S. 173, 182

So long as there is any possible construction of Amendment 2 that is constitutionally permissible, it is facially valid. *See, e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). Here, such a construction is not only possible, but is entitled to great deference because it is that of the Colorado Attorney General.[16]

Read as a whole in light of the circumstances under which it was enacted, Amendment 2 does not, as Respondents contend, eliminate all legal rights for homosexuals and bisexuals or protect those who break the law by harming or threatening homosexuals and bisexuals; rather, it merely invalidates existing, and prohibits future, local and state laws providing special protections beyond those required by the Fourteenth Amendment. The State consistently has interpreted Amendment 2 in a manner that authoritatively dispels Respondents' extreme rhetoric and confirms Amendment 2's facial constitutionality. Amendment 2 simply restores and maintains the *status quo ante* regarding special protections for homosexuals and bisexuals, thereby preserving this area of private autonomy. By its terms, Amendment 2: (1) prohibits state and local governments; (2) from enacting or enforcing any law or policy; (3) recognizing a claim of minority status, quota preferences, protected status, or discrimination, beyond those guaranteed by federal law; (4) premised on homosexual or bisexual orientation, conduct, practices, or relationships.

Respondents focus on the word "discrimination," which, of course, must be read in context with the "minority status," "quota preferences," and "protected status" terms which immediately precede it (and appear in the title of the amendment). These terms are all commonly used in

(1991); Laurence H. Tribe, *American Constitutional Law* 1022 (2d ed. 1988) ("Of course, almost every law . . . is potentially applicable to constitutionally protected acts; that danger does not invalidate the law as such but merely invalidates its enforcement against protected activity").

[16] *See Kolender* v. *Lawson*, 461 U.S. 352, 355 (1983); *Union Ins. Co.* v. *Hoge*, 62 U.S. (21 How.) 35, 66 (1858).

the civil rights context to refer to situations where special consideration or protection is accorded. Applying traditional principles of statutory construction, the accompanying reference to "discrimination" should be given similar import. *See Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) (applying principle of *noscitur a sociis*, *i.e.*, "a word is known by the company it keeps"). Indeed, the special protections relating to sexual orientation promulgated by various Colorado entities prior to the passage of Amendment 2 had themselves been phrased in terms of prohibitions on "discrimination" and expressly brought government regulation into a host of private disputes. *See* J.A. 22, 32, 62, 90. It is therefore unsurprising that in seeking to repeal these measures, the proponents of Amendment 2 used the same terminology.[17]

That Amendment 2 would not deny homosexuals and bisexuals all legal rights was made plain to the voters in the widely distributed Legislative Council Analysis of Ballot Proposals ("Ballot Analysis").[18] The Ballot Analysis noted that "[t]he amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers," and that homosexuals would remain "entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories." Pet. App. F-6, F-7. Amendment 2 is thus readily construed as facially constitutional: it simply realigns the

[17] Respondents complain that Amendment 2 would invalidate only the homosexual aspect of sexual orientation provisions. *See* Resp. Br. 6, 10 n.11, 42. Of course, it remains to be seen whether legislators will elect to retain sexual orientation provisions that apply only to heterosexual discrimination. Even if they do, however, any equal protection problem would properly be addressed in an "as applied" challenge to the ordinance in question, not in this facial challenge to Amendment 2.

[18] *See* Pet. App. F. The Ballot Analysis is recognized in Colorado as providing important insight into the electorate's understanding of a constitutional amendment. *See, e.g., Carrara Place, Ltd.* v. *Arapahoe County Bd. of Equalization*, 761 P.2d 197, 203-04 (Colo. 1988).

rights of Coloradans with those existing under federal law by nullifying the effect of existing state and local laws or policies, which provided special legal protections to homosexuals or bisexuals, and ensuring that such laws are adopted in the future only by statewide referendum.

This construction is consistent with "the State Court's view of the purpose of its own law." *U.S. Term Limits, Inc.* v. *Thornton*, 115 S. Ct. 1842, 1867 (1995). The Colorado Supreme Court properly recognized that speculative interpretations are improper in a facial challenge, basing its decision instead solely on Amendment 2's "unambiguous[]" prohibition on "the enactment of anti-discrimination laws by state or local entities." Pet. App. D-24 n.25. The court determined that Amendment 2 "repeal[s] existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation," *id.* at D-24 (footnote omitted), and "prohibit[s] any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Id.* at D-25. The court expressly *declined* to "determine what broader application Amendment 2 might have," *id.* at D-24 n.25, and no broader construction can be justified in evaluating Respondents' facial challenge.

Respondents' parade of horribles thus provides no justification for overruling *James* (and *Salerno, et al.*)—if an unconstitutional *application* ever occurs, it can be remedied in an "as applied" challenge by the affected individual. Respondents' argument also establishes that Amendment 2, properly construed, is plainly constitutional. Even Respondents concede that Amendment 2's repeal of existing anti-discrimination and preference ordinances could not violate the Fourteenth Amendment. *See* Resp. Br. 6. And, as this Court held in *Crawford* v. *Los Angeles Bd. of Educ.*, 458 U.S. 527, 535-36 (1982), a State is equally free to insist that protections that go beyond the requirements of the Fourteenth Amendment be adopted, if at all, only by statewide referendum.

B. Respondents' claim that *James* can be overruled with little or no impact on federal-state relations is equally flawed. Extending *Hunter*'s narrow exception to any "independently identifiable" group allows the exception to swallow the rule and would place final authority with respect to States' internal structurings firmly in the hands of the federal judiciary. Every law classifies and thus every law affects "independently identifiable" groups, if the person defining the group employs any imagination at all. In *James*, the group directly harmed comprised individuals who supported subsidized housing, and the readily identifiable sub-group was the poor. Here, those immediately affected by Amendment 2 are voters who want anti-discrimination policy set at the local level; an identifiable sub-group is homosexuals and bisexuals. Amendment 2 treats political issues, not individuals differently, and thus reveals that once the search for "independently identifiable" groups is allowed to proceed outside of the unique race-specific context in which it arose, that inquiry becomes meaningless.[19]

Respondents' argument that heightened scrutiny should occur "only" when a law singles out the "independently identifiable" group based upon traits that are unrelated to the issue addressed by the law is also boundless. Virtually every group affected by a legislative classification is defined by characteristics distinct from how members of the group voted. Gun owners, civil servants, incumbent politicians, convicted felons, farmers, insurance companies, hot dog vendors, and members of every other conceivable interest group share common traits which make them "in-

[19] Moreover, witnesses on both sides agreed that there is no consensus or accepted definition of what constitutes homosexuality or bisexuality. *See* R. at v. 13, p. 276; v. 14, pp. 699-700; v. 15, pp. 862, 869-70; v. 17, pp. 1158, 1161-62. If the group definition is inherently a matter of *self*-identification, as Respondents' evidence indicated, then the test collapses upon itself, because it lacks both identifiability and independence. *See Equality Found., Inc.* v. *City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995).

dependently identifiable" quite apart from any legal measure that adversely affects them.[20]

It is not surprising, then, that Respondents have been unwilling to say who—other than homosexuals and bisexuals—can invoke their new fundamental right. In truth, either everyone can invoke strict scrutiny—bringing popular self-government to its knees—or *only* homosexuals and bisexuals qualify—which reveals this proposed doctrine for what it is: a backdoor means to acquire suspect class treatment.

Respondents' *amici* propose an even more radical federal intrusion on the States' internal allocations of authority. Eschewing the whole question of levels of scrutiny, these *amici* make the novel claim that the Equal Protection Clause authorizes the Court simply to *declare* Amendment 2 *per se* unconstitutional *without even examining the State's justifications. See* Br. of *Amici Curiae* Tribe, *et al.*

These *amici* candidly concede that their extraordinary approach is unprecedented—even in the context of race. Further, the entire argument rests on the fallacy that there exists some general state law protection against discrimination of which only homosexuals and bisexuals are deprived by Amendment 2. Of course, just the opposite is true—anti-discrimination laws (as well as quota preferences and minority status) cover *only* members of groups who as a matter of policy have been determined to be deserving of special treatment, an exercise that, by definition, involves line-drawing of precisely the sort reflected in Amendment 2 (and in Title VII of the Civil Rights Act). There certainly is no free-floating fundamental right to have, or to be able to lobby for, state or local quota preferences or protections against discrimination.

[20] Nor are the express references in Amendment 2 to homosexuals and bisexuals of constitutional significance. That language embodies the description of the types of laws and ordinances repealed by Amendment 2. Citing those references, as Respondents do, as evidence of a purposeful *intent* to classify laws granting special protections for homosexuals and bisexuals differently than other anti-discrimination laws adds nothing. Purposeful discrimination is a necessary element of an equal protection claim, *see Washington* v. *Davis*, 426 U.S. 229 (1976), but neither the existence of this classification nor the voters' intent to create the classification is disputed here. Rather, the only issue is the appropriate *level of scrutiny* of the State's justifications for that classification, a question which, in the absence of a suspect class, turns *solely* on the existence or non-existence of a relevant fundamental constitutional right. *See, e.g., Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992).

Amici attempt to conceal this defect by using the term "discrimination" in a purely pejorative sense. But that word, "once divested of its emotional connotation, simply means to distinguish or to draw a line." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 109 (1976). As Respondents concede here and their *amici* have noted elsewhere, all classifications "discriminate."[21] And in the absence of a suspect class or a fundamental right, such "discrimination" is permissible if there is any rational connection between the classification and legitimate state objectives. The *amici*'s approach would substitute an analysis of "important" issues (in a federal court's view) for fundamental constitutional rights analysis.[22]

In the end, Respondents' *amici*, like Respondents themselves, are left arguing that the Court should create a new fundamental constitutional right to demand that the people place no limits on the policies that

[21] *See* Resp. Br. 37 ("By definition, every classification serves the purpose of discriminating against the group that the classification burdens"); John H. Ely, *Democracy & Distrust* 30 (1980) ("Legislation characteristically classifies, distributing certain benefits to, or requiring certain behavior of, some but not others"); Gerald Gunther, *Constitutional Law* 608 (12th ed. 1991).

[22] *Amici* attempt to avoid the limitless nature of their theory by claiming that Amendment 2 is *sui generis* in rendering a group "completely ineligible" to obtain important legal protections. But Amendment 2 clearly does *not* render supporters of special state law protections for homosexuals and bisexuals "completely ineligible" to obtain them. To the contrary, it merely alters the *means* by which such extraconstitutional protections must be adopted in Colorado—after Amendment 2, a statewide referendum is required.

their elected representatives can legislate. To do so would both revolutionize equal protection jurisprudence and completely rewrite the federal-state balance crafted by the Framers of the Constitution, as the *amici* States note, "effectively prohibit[ing] states from addressing many substantive issues at the state level." *See* Br. of *Amici Curiae* States in Support of Petitioners 3; *id.* at 21-24 (cataloging civil service, education, public utility, abortion funding, anti-smoking and other state measures threatened by Respondents' equal protection theory). Fortunately, that result is foreclosed; under this Court's settled authority—with *James* v. *Valtierra* standing at the forefront—Amendment 2 is subject to rational basis scrutiny.

III. AMENDMENT 2 RATIONALLY SERVES LEGITIMATE STATE ENDS.

Highly deferential rational basis review "requires only a rational means to serve a legitimate end." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985). Respondents do not dispute that Amendment 2 serves each of the State's asserted interests; nor do they argue that all of those interests are illegitimate. Indeed, the lower courts found some of those interests to be not only legitimate, but compelling. *See* Pet. App. B-11, B-13, C-14.[23] Respondents contend that Amendment 2 is facially invalid because (1) it was motivated in part by "antipathy," and (2) its "fit" is not sufficiently "tight" to the interests it serves. Both contentions rest on fundamental misunderstandings of the law and the record.

Respondents are, of course, correct that a naked arbitrary desire affirmatively to harm, by itself, is not a legiti-

[23] *See also Equality Found., Inc.*, 54 F.3d at 270 (finding "a litany of valid community interests" supporting a similar provision, including: (1) "enhanced associational liberty"; (2) "returning the municipal government to a position of neutrality"; (3) reducing "governmental regulation" of "private social and economic conduct" and "augment[ing] the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs"; and (4) "cost savings for . . . taxpayers").

mate purpose even for non-racial discrimination. But such antipathy was *not* the purpose of Amendment 2. Respondents stumble in their definition of "antipathy." This Court has repeatedly distinguished antipathy for a group from a belief that, when limited public resources must be allocated, one group is less deserving of those resources than another. *See, e.g., United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 (1980). The record demonstrates that Coloradans are largely tolerant of homosexuality,[24] yet unwilling to support governmental action which confers benefits on a relatively privileged group at the expense of the less-privileged.[25]

Respondents attempt to use carefully selected statements of certain supporters of Amendment 2 to infect with a sense of mean-spiritedness those 813,966 Coloradans who cast votes in favor of Amendment 2. But the trial court expressly rejected this condemnation of voter motives, *see* Pet. App. E-10, and that should be the end of the matter. *Crawford*, 458 U.S. at 545 ("we will not dispute the judgment of the [lower court] or impugn the motives of the State's electorate"). In any event, there is simply no basis upon which to conclude that nearly a million Colorado voters were motivated by antipathy.[26] Amend-

[24] In a December 1992 survey: (a) 81% agreed that, except for their choice of sexual partners, homosexuals are not really different from anyone else; (b) 59% thought homosexuals should be allowed to serve in the military; (c) only 6% thought homosexuals were more likely than heterosexuals to molest children; and (d) only 13% thought homosexual behavior should be illegal. *See* Def. Ex. B. (J.A. 120, 123-25; v. 9, p. 65-70).

[25] Seventy-three percent of those surveyed a month after the election thought Amendment 2 was enacted in opposition to laws that give homosexuals a type of special or protected status. *See* Def. Ex. B (J.A. 120; v. 18, p. 1341; v. 19, pp. 1349-51).

[26] *See, e.g., City of Mobile* v. *Bolden*, 446 U.S. 55, 92 (1980) (Stevens, J., concurring) ("a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decision-making process were motivated by a purpose to disadvantage a minority group"); *Arthur* v. *City of Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986) (inquiries into voter motivation permissible only in the context of race).

ment 2 undeniably was the result of a hard-fought political campaign involving instances of "extremism on both sides," R. at v. 16, p. 897,[27] but the Amendment's sponsors specifically disavowed "hatred" as a motive or effect of the Amendment, relying instead on the basic theme that

> Amendment 2 says basically one thing: that homosexuals, like all Americans, deserve *equal rights*. But nothing about their circumstances, their lifestyle or their political power rates them as a group in need of *special* rights.

Lodging at 7. Significantly, the Ballot Analysis did not include *any* of the fears to which Respondents now point as motivating passage of the amendment. That analysis fully supports the interpretation of Amendment 2 urged by Petitioners. *See* Pet. App. F. *See also Crawford*, 458 U.S. at 543-45 (declining to look beyond the purposes of the proposition as "stated in its text").

Respondents' obsession with the "fit" between Amendment 2 and each of the individual legitimate state interests it serves is equally misplaced. Under rational basis review, a law need not represent a "[]perfect fit between means and ends," *Heller* v. *Doe*, 113 S. Ct. 2637, 2643 (1993), but only a "rough accommodation" of the State's interests. *See, e.g., San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 55 (1973). Respondents merely assume, without analysis, that the purposes of Amendment 2 cannot "explain the law's particular selectivity." Resp. Br. 38. As always, the critical question is whether there *is* a rational reason that justifies disparate treatment. As shown, the Colorado voters' decision to focus on the issue

[27] Respondents make much of the morality-based concerns expressed by certain supporters of Amendment 2. But this Court has repeatedly recognized the validity of legislating on the basis of moral judgment. *See, e.g., Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991) (plurality opinion) (State's interest in "protecting order and morality" is "compelling; substantial; subordinating; paramount; cogent; strong"); *id.* at 2465 (Scalia, J., concurring); *id.* at 2469 (Souter, J., concurring). And, in any event, Amendment 2 promotes far more than a simple moral judgment.

of group protections for homsexuals and bisexuals is supported by a number of rational bases, including a concern that an amendment forbidding special preferences on the basis of sexual orientation more generally could have threatened existing marriage, tax, and other laws, thereby seriously undermining legitimate state interests.

An additional flaw in Respondents' analysis is their failure to consider whether Amendment 2 is rationally related to the State's asserted interests considered in the *aggregate*. This Court has repeatedly stated that it "will not overturn . . . a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of *any combination* of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) (emphasis added). Respondents' interest-by-interest approach incorrectly assumes that what could be constitutionally accomplished by several more narrowly tailored amendments cannot be accomplished in a single amendment that promotes all of the State's asserted interests simultaneously. *See, e.g., Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) ("That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional"). That portion of Amendment 2's "sweep" not fully explained by the State's interest in promoting religious freedom, for example, is easily justified by the State's other legitimate interests, including the State's desire to use its limited resources to provide the benefit of anti-discrimination laws to those most in need.

Even assessed individually, however, each of the State's interests easily satisfies rational basis review. For example, Amendment 2 is a rational response to the undisputed fact that Colorado has finite resources. While this Court has held that a State need not allocate *any* of its resources to provide members of any group with protections from discrimination beyond those afforded by the

Fourteenth Amendment, *see Crawford*, 458 U.S. at 535-40, Colorado has chosen to provide some such benefits. As the trial court found, homosexuals tend to be better educated, wealthier, and possess greater political clout than the public generally, and surely when compared to other protected minorities. *See* Pet. App. B-6 n. 3, C-18. The people of Colorado chose to use the State's limited resources for the benefit of other groups (*e.g.*, racial minorities) who are generally less well situated.[28] This Court has repeatedly affirmed the rationality of this approach.[29] Indeed, that the line drawn by the people of Colorado is both rational and constitutionally legitimate is demonstrated by the fact that Congress in Title VII of the Civil Rights Act made a similar judgment.

Respondents do not even contest that Amendment 2 advances religious freedom or associational privacy; rather, they argue only that these interests "cannot explain either Amendment 2's sweeping ban on protection or its selective concentration of burdens on one group." Resp. Br. 40. But certainly, the State's religious freedom and associational privacy interests explain the repeal of existing special rights and the removal of the issue to the state referendum process. No more is required in this facial challenge.[30] And the people of Colorado could rationally

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[28] Respondents are simply wrong in contending that anti-discrimination protections for homosexuals do not "consume governmental resources." Resp. Br. 41. Every enforcement of such laws utilizes finite court time and resources, placing additional costs on a system already unable speedily to consider the discrimination claims of the relatively less privileged. Respondent cities effectively concede as much: some drew policy lines that exempted small landlords and businesses, while others did not. *Compare* J.A. 33, 42 *with* J.A. 62, 90.

[29] *See, e.g., Jefferson* v. *Hackney*, 406 U.S. 535, 549 (1972); *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970).

[30] In repeatedly citing *City of Cleburne* v. *Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985), Respondents ignore that *Cleburne* was an "as applied" challenge, and that the Court *vacated* the lower court's facial invalidation of the challenged statute, affirming only

conclude that because laws granting special protections to homosexuals may infringe *both* religious freedom and privacy interests, such laws do greater damage to those interests than other anti-discrimination provisions. *See, e.g., Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 488-89 (1955) (State may address continuum of activity that differs by degrees "one step at a time"). Amendment 2 restores government neutrality on a difficult and divisive social issue; it promotes basic liberty interests by recognizing a diversity of views on this issue.[31]

Finally, Respondents' claim that the State's interest in deterring factionalism—*i.e.*, resolving an issue as a matter of statewide policy—is illegitimate is foreclosed by this Court's repeated recognition that the prevention of factionalism is not only a legitimate, but a *compelling* State interest.[32] Respondents contend that "Amendment 2 suppresses 'factionalism' only by suppresing one side of the political debate." Resp. Br. 47. To the contrary, *neither* side of the debate is suppresed; rather, Amendment 2 requires only that views on this issue—whenever, wherever and by whomever expressed—be *acted upon* by statewide referendum.

* * *

This facial challenge to the constitutionality of Amendment 2 can be correctly decided on the basis of two simple propositions. First, there is no difference between classifications based on poverty and classifications based on homosexuality or bisexuality for purposes of the Equal Protection Clause's fundamental rights analysis, and thus *James* v. *Valtierra* requires this case to be decided under rational basis scrutiny. Second, the same judgment that

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a finding that a particular application was invalid because it rested *solely* "on an irrational prejudice." *Id.* at 447, 450.

[31] Respondents ignore that Amendment 2 repeals laws which expose private individuals to substantial criminal and civil penalties in an extraordinarily broad set of circumstances.

[32] *See, e.g., Storer* v. *Brown*, 415 U.S. 724, 725, 736 (1974); *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989); *Burdick* v. *Takushi*, 504 U.S. 428, 439 (1992).

motivated Congress not to extend the protections of Title VII to homosexuals and bisexuals legitimately motivated Coloradans to repeal those same protections from state agencies and local governments and to insist that the issue be resolved solely, but fairly, by the electorate as a whole.

At the end of the day, Colorado homosexuals and bisexuals, like all individuals, retain Equal Protection Clause protection from irrational *government* classifications (and irrational or unintended *applications* of Amendment 2), but, like most individuals, they have no right to demand government intervention in purely *private* decisions. Through Amendment 2, the people of Colorado overruled the decisions of some of their elected representatives to interject government in such private choices. Amendment 2 accomplishes that goal in a single measure without requiring repetitive repeal efforts, and under this Court's prior decisions Amendment 2 is constitutional.

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

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No. 94-1039

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE HISTORICAL CONTEXT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY	5
II. THE POTENTIAL IMPACT ON THE LEGITIMACY OF THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY	9
III. THE MECHANISM THE COURT BELOW USED TO ENFORCE SOCIAL CHANGE, ESTABLISHMENT OF A NEW FUNDAMENTAL RIGHT, STRONGLY COUNSELS AGAINST A RULING THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY	14
IV. THE PROMINENCE OF THE MORAL DYNAMIC IN THE QUESTION BEFORE THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE'S EXPRESSION OF THEIR CONSENSUS ON HOMOSEXUALITY	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page

Bowers v. Hardwick, 478 U.S. 186 (1986) 9, 11, 12 17, 18, 19
Compassion in Dying v. State of Washington, No. 94-35534 (9th Cir. 1995) (1995 U.S. App. LEXIS 4589) 4
Dallas v. Stanglin, 490 U.S. 19 (1989) 20
Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) 18
Evans v. Romer, Nos. 94SA48 & 94SA128, slip op. (Colorado Oct. 11, 1994) 12, 16, 17, 19, 20
Furman v. Georgia, 408 U.S. 238 (1972) 8
Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) 17
Gregg v. Georgia, 428 U.S. 153 (1976) 8
Griswold v. Connecticut, 381 U.S. 479 (1965)..... 14, 17
High Tech Gays v. DISCO, 895 F.2d 563 (9th Cir. 1990) 16
Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981).... 18
Parker v. Levy, 417 U.S. 733 (1974) 18
Roe v. Wade, 410 U.S. 113 (1973) .....*passim*
Steffan v. Perry, No. 91-5409, slip op. (D.C. Cir. Nov. 22, 1994) 18
Trop v. Dulles, 356 U.S. 86 (1958) 8
Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) 6
United States v. Wilson, No. 94-CR-140, slip op. (E.D. Wis. Mar. 16, 1995) 11
United States v. Brock, No. 94-CR-86, slip op. (E.D. Wis. Sep. 23, 1994) 11
Weems v. United States, 217 U.S. 349 (1910)..... 8
Woodson v. North Carolina, 428 U.S. 280 (1976).. 8

STATUTES

Policy on Homosexuality in the Armed Forces, 10 U.S.C. § 654 6
Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 11

TABLE OF AUTHORITIES—Continued

BOOKS Page

Birkby, *The Court and Public Policy* (1983) 6, 7, 8, 11
Stone, et al., *Constitutional Law* (1986) 12
Wells-Petry, *Exclusion: Homosexuals and the Right to Serve* (1993) 5
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v.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

---

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The Family Research Council is a national organization founded in 1981. It is an independent, non-profit, advocacy organization dedicated to ensuring that the interests of the family are considered and respected in the formation of public policy. The Council works to create in the Legislative, Executive and Judicial branches of the federal government an understanding of pro-family issues.

Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The Colorado Supreme Court has pronounced public policy. In so doing, the court created a public policy antagonistic to the proper role of the respective branches of government, and one which results in extraordinary judicial intrusion on the social functions of democracy.

The court's holding, that the people of Colorado may not amend their constitution to preclude laws that support homosexuals as a protected class, was predicated on the establishment of a new fundamental right, the "right to participate equally in the political process."

Nevertheless, despite the court's delineation of this new right, in practical terms, the case below has little to do with the political process. Rather, it has everything to do with the people of Colorado's expression of their consensus on the matter of homosexuality.

In reality, the practical policy announced by the court was this: if the people of Colorado desire that their laws affirmatively support homosexuality, that is allowed. But, precedent and history aside, in Colorado, homosexuality cannot be the subject of negative public regulation, even regulation by omission.

In effect, the court below provided homosexuals with "easy money"—a new constitutional right—with which to buy a result they manifestly did not earn in the marketplace of ideas. This new right allows homosexuals to circumvent the process of obtaining a consensus for their ideas in that marketplace of ideas. Moreover, it allows homosexuals to insulate their ideas from that market's ebb and flow. Indeed, no matter what ideas homosexuals advance, the people of Colorado never can use the ballot box affirmatively to reject those ideas.

Thus, the ruling below, seen as broad public policy as well as constitutional interpretation, represents tremendous change in the functioning of our democracy. The people, demonstrably and correctly, are not at all sanguine about such judicial activism, and no doubt they will bring to the Court's attention the many compelling legal arguments that debunk the decision below.

Nevertheless, the fact remains that, with or without legal portfolio, the Colorado Supreme Court has pronounced public policy and, clearly, when courts do legislate, there are factors that portend either success or failure. Therefore, in addition to close legal analysis on the substance of that court's decision, it is appropriate forthrightly to inquire whether the court has made *good* public policy. That is, beyond the invitation to exercise sweeping legislative power that is the salient issue in this case, the Court should be instructed by the indicia of public policy consequences that accompany the establishment of a new "right to participate equally in the political process."

The public policy issues inherent in the legal analysis below, in particular, the judicial exercise of sweeping legislative power in an area that involves quintessential moral questions, raise a specter that is familiar to this Court and the nation. Indeed, for predicting the public policy consequences of the decision below, there exists nowhere a more graphic or poignant object lesson than the holding and historical impact of *Roe v. Wade*, 410 U.S. 113 (1973).

Regardless of various views on abortion itself, it is plain that no other decision so gravely has impacted the fabric of the social contract of our Republic, and the legitimacy of the judiciary, as *Roe*. Today the Court is invited to repeat *Roe's* judicial overreaching by again imposing its moral judgment through the establishment of a new fundamental right that is textually flimsy and conceptually sheer.

This result must be avoided, and the object lesson of *Roe*, and its social, political, and jurisprudential ramifications, demonstrates why. The historical context for the decision, the effect on the legitimacy and independence of the judiciary, the mechanism for enforcing social change, the prominence of the moral dynamic—on every relevant point, our nation's experience with *Roe* counsels the greatest caution in allowing the analysis of the court below to stand.

Roe established a new fundamental right, the right to privacy. It also strictly limited the power of the states to regulate abortion. Likewise, the Colorado Supreme Court has established a new fundamental right, the right to "equal" political participation. It also strictly limited the power of the state to regulate homosexuality. Moreover, just as the *Roe* analysis has not been confined to abortion, *see, e.g., Compassion in Dying v. State of Washington*, No. 94-35534, slip op. (9th Cir. 1995) (1995 U.S. App. LEXIS 4589), the analysis in the instant case must extend to any group disadvantaged by legislation.

In both cases, but especially now with the benefit of more than twenty years of hindsight, the indicia of public policy disaster are clear. Thus, to preserve the proper functioning of government, including the legitimacy and independence of this Court, the present invitation to repeat *Roe's* judicial overreaching by again imposing the Court's moral judgment through the creation of a new fundamental right must be declined.

ARGUMENT

I. THE HISTORICAL CONTEXT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

Homosexuality is a lively topic in America's marketplace of ideas. Much of this social dialogue is framed in legislation. Many states have organizations that participate in this debate, both for and against homosexuality.[1] In 1992, Oregon and Colorado had ballot initiatives regarding homosexuality. *Anti-gay Rights Ballot Initiatives*, Boston Sunday Globe, Nov. 28, 1993, at 20. In 1993, 19 local ordinances similar to Amendment 2 were approved by voters. *Gay Rights Advocates Brace for Ballot Fights*, New York Times, Nov. 12, 1994, at A17. In 1994, eight states, a record number, had such initiatives underway. *Id.*

At the local level in 1993, voters in Cincinnati, Ohio and Lewiston, Maine followed the example of voters in Tampa, Florida and Irvine, California, and repealed existing laws prohibiting discrimination based on sexual orientation. *Gays Lose in Three City Ballot Initiatives*, Washington Blade, Nov. 5, 1993, at A1; Melissa Wells-Petry,

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[1] Examples of local groups that oppose legal condonation of homosexuality are: ***Alaska***, Evangelical Pastors' Task Force of Anchorage; ***California***, Traditional Values Coalition; ***Florida***, American Family Political Committee of Florida; ***Hawaii***, Ohana Policy Center; ***Idaho***, Idaho Citizens Alliance; ***Kentucky***, Family Foundation; ***Michigan***, Michigan Family Forum; ***Minnesota***, Minnesota Family Council; ***Mississippi***, American Family Association; ***Missouri***, Family Watch, Inc., Missouri Amendment Coalition; ***New Mexico***, New Mexico Boys Ranch, Inc.; ***Ohio***, American Heritage Coalition, Take Back Cincinnati, Citizens for Community Values; ***Oregon***, Oregon Citizens Alliance; ***Pennsylvania***, Straight Americans Military, Inc.; ***Virginia***, Christian Coalition; ***Washington***, Citizens Alliance of Washington, Youth Action Coalition. Files of the Family Research Council.

Exclusion 175 (1993); *Irvine's Human Rights Ordinance*, Los Angeles Times, Oct. 28, 1989, at B12. That same year, in Portsmouth, New Hampshire, by a 2-1 margin, voters rejected the call for an ordinance giving special protection to homosexuality. *Washington Blade* at A1.

In 1993 in New York City, the chancellor of public schools was fired because parents objected to curricula that advocated homosexuality. *NYC's Controversial Schools Chancellor Ousted*, Washington Post, Feb. 11, 1993, at A3. When, in 1993, the President announced his initiative to open the armed forces to homosexuals, lawmakers received a tremendous outpouring of public opinion, resulting in congressional codification of the military's policy excluding homosexuals from service. 10 U.S.C. § 654. Indeed, though a matter of legislative debate for many years, the Congress repeatedly has declined to accord special status to homosexuality. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. den'd*, 471 U.S. 1017 (1985).

Clearly, the court below was not stepping into a public policy or public opinion vacuum on homosexuality. Indeed, the historical context for the ruling below—dynamic social debate and widespread legislative expressions on homosexuality—is strikingly similar to the context in which *Roe v. Wade* was decided.

After the Civil War, abortion statutes began to replace the common law. The statutory law almost universally made abortion a felony subject to severe punishment. In the "century between 1850 and 1950 . . . practically every American and European jurisdiction [banned] abortion unless necessary to save the life of the mother." Robert H. Birkby, *The Court and Public Policy* 382 (1983).

By 1972, fourteen American states had liberalized the otherwise complete ban on non-therapeutic abortion,

though no jurisdiction in America or Europe had come close to enacting the liberal access to abortion that would follow *Roe*. *Id*. In each case, the liberalization had come through deliberation in the legislative process, not through judicial intervention.

In this modest change among 14 states, some perceived a permissive, and, it must have been assumed, massive and permanent shift in societal attitudes toward abortion. Indeed, Justice Blackmun began the majority opinion in *Roe* by citing the *attitudinal changes in society* as the moving force behind the Court's analysis. *Roe*, 410 U.S. at 113.

As it turned out, however, this perceived attitudinal change, the very ground that allegedly substituted for the lack of a textually coherent basis or judicial precedent, was neither massive, permanent, nor—apart from the institutional norm of *stare decisis*—able to sustain the Court's foray into major policymaking.

Thus, from the historical context alone, it is self-evident why *Roe* routinely is rated as "the most raw exercise of judicial power since *Dred Scott* . . . [a decision even] very activist legal commentators who admired and defended the Warren Court balked as defending . . . ." Christopher Wolfe, *The Rise of Modern Judicial Review*, at 307 (1994). Simply put, many social observers, irrespective of views on abortion, have concluded that the "country would have been far better off had the Supreme Court in *Roe* stayed its hand and permitted the people of the states to decide abortion policy." *See, e.g.*, Terry Eastland, *Shameless in Seattle*, American Spectator, July 1994, at 58.

Moreover, *Roe* is not the only instance of a perception of public opinion, or of what public opinion ought to be, leading the Court into holdings that subsequently disrupted the social process and fell into disrepute. Another example is the Court's and the nation's experience, with the death penalty cases.

In its early analysis, the Court viewed the Cruel and Unusual Punishment clause as a provision that "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States,* 217 U.S. 349, 378 (1910). Then the Court found the clause derives "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100-101 (1958). Finally, in 1972, the Court pronounced that society had evolved to the point where capital punishment was no longer acceptable. *Furman v. Georgia,* 408 U.S. 238 (1972).

The historical context? One commentator observes that the Court's dramatic outlawing of capital punishment was accomplished "despite the fact that 39 states plus the District of Columbia had the death penalty . . . . [I]n the wake of *Furman,* 35 states reenacted capital punishment statutes in an effort to retain the penalty within the somewhat obscure guidelines established by the Court. . . . In addition, California voters by referendum effectively overturned a state court decision abolishing the death penalty." *Birkby* at 239-40.

In short, the Court in *Furman,* as in *Roe,* strayed from a strict constitutional analysis, relied on public opinion and relied wrongly. By 1976, the Court's read on public morality was repudiated completely and the death penalty was reinstituted. *Gregg v. Georgia,* 428 U.S. 153 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Plainly, the Madisonian dilemma of determining when the majority is, in fact, tyrannizing the minority is not resolved by reading the public's tea leaves, whether through informal surmisals of public opinion, as the Court engaged in in *Roe,* or through the ultimate public opinion poll, a ballot initiative such as Amendment 2. Neither is self-justifying. Rather, the dispositive factor, in constitutional, but ultimately also in public policy analysis, is the existence of an enumerated, or at least textually

and historically recognizable, fundamental right. In practical terms, the more clearly the people are expressing themselves on a matter, the more explicit the constitutional counterpoint should be if it is said to form the basis for judicial imposition of broad public policy.

No such constitutional counterpoint exists to justify overriding the clearly expressed will of the people of Colorado. Homosexuality, in Colorado and across the nation, is the subject of a momentous social debate. History, as well as the law, proves it is not only proper, but prudent that this debate be allowed to run its course, democratically and without unwarranted dictation from the judicial branch. *Cf.* William A. Henry III, *Pride and Prejudice,* Time, June 27, 1994, at 58 ("a gay-rights bill was enacted in 1989 after 17 years of legislative debate").

Clearly, it is a perilous task for the Court to usurp the legislature as the vehicle for expressing the people's moral consensus on matters "having little or no cognizable roots in the language or design of the Constitution," or matters which are not " 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty. . . .' " *Bowers v. Hardwick,* 478 U.S. 186, 194-95 (1986). Without the guiding light of enumerated constitutional rights, there is serious risk that the resulting jurisprudence will leave the public square in disarray and the Court in dishonor.

II. THE POTENTIAL IMPACT ON THE LEGITIMACY OF THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

As abortion and capital punishment were milestones for the Court in decades past, homosexuality is the issue of the moment. Regardless of the language of rights and political participation and redress, clearly the case below chiefly is about homosexuality.

The people of Colorado, by exercising their constitutional rights, have expressed their consensus on homosexuality. And, while surely the Court can claim expertise on learned constitutional matters, the plain fact of the matter is that the public cannot be convinced that the Court knows more than the people of Colorado about the proper response to homosexuality in that state. This credibility gap, which relates directly to the perception of the Court's legitimacy, is even wider when the mechanism for overcoming the people's common sense on a moral matter is the discovery of a new fundamental right.

Indeed, it was the "discovery" of rights that brought *Roe* into disrepute. The right to abortion was not found through a straightforward reading of the Constitution or careful inquiry into history or our concept of ordered liberty. Rather, this right appeared through labyrinthine theorizing that, despite judicial efforts to make the best of it, is still roundly criticized from all corners as essentially anti-intellectual.

It is just such overreaching that sows the harsh and tenacious seed of discredit when the judiciary, *under cover of a new fundamental right,* ventures into areas such as whether abortion is right or wrong, capital punishment good or bad, and, here, whether homosexuality should be encouraged or discouraged by the law. In such areas, which are characterized by a quintessential moral choice, questions about the Court's legitimacy when it forecloses political choice are inescapable.

Without doubt, *Roe* is the paradigm of the social division and disruption in representative government that results when the judiciary forecloses political choice. It is axiomatic that creating more and more "rights" exempts more and more subjects from democratic control. Thus, democracy, and the social contract, or, as Thomas Sowell denominates it, the common moral universe,

shrink. As democracy shrinks, so do its institutions. Ironically, this shrinkage is notable first in the diminished legitimacy of this Court.

Plainly, the "enormous controversy over [*Roe*] raised the question of [the Court's] legitimacy very strongly." *Wolfe* at ix. At *Roe's* entry, for example, only 14 states had moved toward modest liberalization of access to abortion. But immediately after *Roe,* "[41] abortion statutes, most of them intended to confine or circumvent *Roe,* were adopted in 1974 alone, 15 in 1975, and 23 in 1976. . . . By the mid-1980's, only nine states and the District of Columbia were authorizing the use of public funds to pay for abortions other than those necessary to save the life of the mother." *Birkby* at 386. Indeed, "[*Roe*] led to substantial nationwide attacks on the Court's power." *Wolfe* at 307.

Time has not healed this social wound; in fact, time has only exacerbated the frustration that ideas that advance anything less than abortion on demand are, by judicial fiat, outside the realm of political choice. Most strikingly, more than two decades after the Court announced the right to abortion, the federal government deemed it necessary to enact a statute to respond to public reaction to *Roe.* In what might be seen as a sort of judicial nemesis, the legislation begat by *Roe,* the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, with some of the severest punishments ever seen for social protest, itself arguably is unconstitutional. *See United States v. Wilson,* No. 94-CR-140, slip op. (E.D. Wis. Mar. 16, 1995); *but see United States v. Brock,* No. 94-CR-86, slip op. (E.D. Wis. Sep. 23, 1994).

Nevertheless, even among those with differing views on abortion, there is consensus that much of the social division and political disruption that followed *Roe* would not have occurred had the decision been on firm constitutional or statutory ground, and had it not overturned existing laws on abortion in all fifty states. *Cf. Hardwick,*

478 U.S. at 194-95 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution").

The analogy of the instant case to *Roe*, and its impact on the legitimacy of the Court, is unavoidable. The right discovered by the Colorado Supreme Court has *no* firm grounding in the Constitution. It emerges only by ignoring clear precedent of this Court. It survives only by overturning positive law enacted by the people of Colorado. It precludes political choice, and it sharpens the politicization of judging.

First, there simply is no support in law or logic for the notion that a legislative choice that disfavors a group, *that is not a suspect class and is, in fact, politically powerful, Evans v. Romer*, Nos. 94SA48 & 94SA128, slip op. at n.3 (Colorado Oct. 11, 1994); *id.* at n.1 (Erickson, J., dissenting), unconstitutionally "fences" that group out of the political process. *Id.* at 1.

Secondly, the court below ignores, because it has no power to overturn, this Court's jurisprudence that "has essentially frozen the list of 'fundamental' interests." Geoffrey Stone, et al., *Constitutional Law*, at 831 (1986). This freeze is based on the well-founded and well-delineated reluctance to create new right—rights which, in addition to shrinking democracy, implicitly, but inexorably, engage the Court in further social engineering. *See, e.g., Wolfe* at 258 ("The Warren Court . . . expanded the category of 'fundamental rights' dramatically and undertook to establish broad social policy"); *Hardwick*, 478 U.S. at 194-95. Such social engineering by the judiciary is not only wrong as a matter of constitutional law, it is wrong-headed as a matter of public policy. Only the legislature is assigned the agility needed to re-engineer society constantly.

Moreover, for the decision below to survive and become the law of the land, it must overturn Amendment

2, a measure adopted by 813,966 Coloradans acting in self-government and surely due a strong measure of judicial deference. It also must overturn, or preclude, the laws of every town, city, and county, as well as state-wide laws, that do or would prohibit recognition of homosexuals as a protected class.

Finally, in practical terms, the establishment of the right to equal participation in the political process has all the hallmarks of a new, additional litmus test for judicial appointment, thus threatening to escalate at least the appearance of political judging. Indeed, once an advocacy group is able to persuade the judiciary to impose what no elected legislature would enact, the Faustian deal is on. By definition, continued viability of the new "right" depends wholly on the Court. Thus, most of the group's energy and efforts are focused on the political sympathies of the justices and the political resolve of the judiciary's gatekeepers.

As clearly demonstrated in our nation's experience with *Roe*, because the Court precluded any effective public policy choice on the issue, those who support abortion and those who do not must be forgiven for concluding the entire Republic falls or stands on the views of each justice, or that collective moral judgments always are hostage to potential judicial mischief. This highly politicized judicial climate cannot, and does not, foster the appearance of the Court as a legitimate, independent, impartial branch of government.

Plainly, the result in the instant case cannot undo the obvious public policy legacy of *Roe*. *But the Court can avoid repeating and exacerbating the public policy mistakes that have harmed the reputation of the law*. Clearly, this Court must decline to tell the people of Colorado, or any other state, that they are forbidden from expressing in law their social and moral consensus on homosexuality.

III. THE MECHANISM THE COURT BELOW USED TO ENFORCE SOCIAL CHANGE, ESTABLISHMENT OF A NEW FUNDAMENTAL RIGHT, STRONGLY COUNSELS AGAINST A RULING THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

This discussion began with the observation that the court below had pronounced public policy. As noted above, the court provided homosexuals with "easy money" —a new constitutional right—with which to buy a result they manifestly did not earn in the marketplace of ideas.

Again *Roe* is instructive. While the court in the instant case did not go so far as to use the word "penumbra," it followed a similar analysis in discovering a right to participate equally in the political process.

In a dissent that foreshadowed what would occur in *Roe*, in *Griswold v. Connecticut*, Justice Black cogently observed:

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible or more or less restricted in meaning. *This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures."* . . . I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some special constitutional guarantee.

Griswold, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting) [emphasis added].

This method was employed deftly by the court below, and this "fact is well illustrated by the use of the term ['right to participate equally in the political process'] as a comprehensive substitute for the ['right to vote']." *Id.* The result was both to dilute and to expand that right, *depending on how one intended to vote.*

Over 1,524,000 Coloradans exercised their right to vote on Amendment 2. But in a sort of constitutional shell game, the court below substituted for the right to vote a more comprehensive right for those who support homosexuality and a severely restricted right for those who do not support homosexuality.[2] Those in Colorado, 813,966 at last count, who oppose special recognition of homosexuality have *no* effective political forum open to them. Political choice is truncated, in real terms, forever.

Indeed, even if the people of Colorado prevailed upon Congress to enact the provisions of Amendment 2, following the analysis below, the law could not stand. As significant, if the court has discovered a new fundamental right, perforce everyone must have it. In effect, as *Roe* did on abortion, the Court today is invited to set national policy on homosexuality.

The mechanism for enforcing this policy—establishment of a new fundamental right—greatly increases the scope of social engineering, if not outright social disruption, that inheres in the lower court's opinion. Inescapably similar to *Roe*, the opinion below proceeds completely to obstruct the contemporary consensus on homosexuality, as well as the legitimate role of the people in self-government. This effort must fail.

First, while declining to bootstrap homosexuals into the classical civil rights framework of suspect classifications, nevertheless the court accorded homosexuals the protec-

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[2] On first blush, the ruling below seems to prohibit only laws that preclude homosexuals from enacting laws in their favor. But the court also implicitly found that the "right to participate equally" was burdened if homosexuals were forced to participate at the *same level*—here, state-wide—*or higher, i.e.*, at the national level. Thus, *no* unfavorable law on homosexuality could withstand the court's analysis. Even if a town, with no subordinate jurisdictions, enacted Amendment 2-type provisions, homosexuals could obtain a law in their favor only by political action at the town level or higher. Under the ruling below, this would be an impermissible burden on homosexuals' right to participate in the political process.

tions of a special class. Indeed, ironically the court bestowed on homosexuals the very privileges the people of Colorado sought to stay. *Evans*, slip op. at 1 (Erickson, J., dissenting).

Secondly, since the court clearly departed from the settled suspect classifications—indeed, the court explicitly ruled that homosexuals are *not* a suspect class—there is no principled way to confine this right to equal participation in the political process to advocates of homosexuality. Quite contrary to the interpretive principle of neutral application, by untethering itself from traditional equal protection analysis, the court below demonstrated graphically that:

> 'Situational ethics' and other intellectual fads, together with a cheap glorification of gross violations of social norms, are steadily eroding the moral standards of the society. Moreover, the idea that these moral norms apply ultimately to everyone . . . is being destroyed by a new surge of tribalism that says *it all depends on whose ox is being gored.*

Thomas Sowell, *Race and a Lost Moral Universe*, Washington Times, Sept. 13, 1994 [emphasis added].

Gone are the criteria that, to be afforded the protections of heightened scrutiny for legislative classifications, a group must "1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, and 3) show that they are a minority or politically powerless. . . ." *High Tech Gays v. DISCO*, 895 F.2d 563, 573 (9th Cir. 1990).

Under the analysis below, all that need be done is to collapse the distinction between equal protection claims based on suspect classes and those based on fundamental rights, denominate the special privileges of a suspect class as a new, free-standing fundamental right, and award said right to various groups, *depending on whose ox is being gored.*

In other words, the court below availed itself of "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right." *Griswold*, 381 U.S. at 509. It created a more comprehensive right (the right to participate equally in the political process) as a substitute for an established right (the right to vote)—and then doled out this new right according to the content of one's vote. In so doing, it employed the last resort of a court bent on social change—the discovery of a new fundamental right. *Cf. Hardwick*, 478 U.S. at 194-95.

IV. THE PROMINENCE OF THE MORAL DYNAMIC IN THE QUESTION BEFORE THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE'S EXPRESSION OF THEIR CONSENSUS ON HOMOSEXUALITY.

Even before *Roe v. Wade*, a prescient district court identified the fact that would make the Court's incursion into abortion policymaking the most flammable issue in our society. This fact is that in abortion, as in homosexuality, "every argument starts from and returns to an ethical or religious assumption." *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689, 709 (1967).

Nevertheless, the moral dynamic of abortion perhaps was the part of the social equation given shortest shrift in *Roe*. Certainly, that is true regarding Amendment 2. It does not appear that the Court foresaw how deeply *Roe* would embroil the moral soul of the nation. Likewise with homosexuality, the temptation for those in favor of homosexuality is to dismiss the importance, indeed the enduring power, of the moral dynamic. In fact, the court below went so far as to find that "antidiscrimination laws [and presumably anti-antidiscrimination laws] make no assumptions about the morality of [homosexuality]." *Evans*, slip op. at 25.

One homosexual advocacy group, for example, has the slogan: *"we're here, we're queer, get over it."* As the

history of public reaction to *Roe* demonstrates, however, people do not "get over" moral principles. In fact, if *Roe* is any indication, allegiance to personal moral principles may solidify in the face of a judicial fiat to "get over it." Certainly social mores change and change again, but this is precisely why reflecting such change is a legislative, not judicial, function. For practical as well as constitutional reasons, such changes "must arrive through the *moral choices of the people and their elected representatives*, not through . . . this court." *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) [emphasis added].

Denying or dismissing the moral dynamic of homosexuality is not new, even though the law always has recognized that it "should . . . be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right." *Parker v. Levy*, 417 U.S. 733, 765 (1974). One judge concluded, for example, "[it is] of *no significance* that the [homosexual] conduct in question may be condemned as immoral by a majority in our society." *Miller v. Rumsfeld*, 647 F.2d 80, 86 (9th Cir. 1981) (Norris, J., dissenting) [emphasis added].

This seems a bold conclusion indeed, yet the court below implicitly employed such reasoning. Plainly, in the pursuit of result-oriented jurisprudence that favors homosexuals, such courts, as the Court of Appeals for the District of Columbia Circuit recently observed, in fact are in "rebellion." *Steffan v. Perry*, No. 91-5409, slip op. at 18 (D.C. Cir. Nov. 22, 1994).

It is not too strong to say that such courts, including the lower one in this case, are in rebellion not only against precedent—for example, the clear theme that the law "is constantly based on notions of morality," *Hardwick*, 478 U.S. at 195—they also are in rebellion against the legitimate expression of the legitimate will of the people.

Indeed, as one commentator on the law has observed, "[d]issatisfaction with the Constitution—either because its prescriptions are wrong, or, more often, *because they do not go far enough*—is at the heart of the development of modern constitutional interpretation and judicial review." *Wolfe* at 205 [emphasis added]. Even more to the point, a "moment's reflection suggests . . . that Supreme Court departures from the original meaning of the Constitution are advocated *precisely because* those departures are not correctable democratically. The point of the academic exercise is to be free of democracy in order to impose the values of an elite upon the rest of us." Robert H. Bork, *The Case Against Political Judging*, National Review, Dec. 8, 1989, at 24.

In the instant case, rebellion is the only term that describes accurately the lower court's approach to the people's democratically-expressed consensus on homosexuality. First, the court denied that Amendment 2 even had a moral dynamic. *See Evans*, slip op. at 25 & 26. It then held, in the alternative, that Amendment 2 was neither necessary to, nor effective in, promoting public morals. *Id.* at 25.

The court's first premise, that Amendment 2 had no moral dynamic, flatly was contradicted by the uncontroverted evidence of the people, as well as by common sense. Clearly, Amendment 2 does not *require* discrimination against homosexuals. Rather, it simply allows each individual to act according to his own deeply held moral and religious values on an issue that conspicuously engages "a millennia of moral teaching." *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring). In political context, Amendment 2 was a clear statement by the people of Colorado that they did not consider it wise to start down the road toward affirmative action for homosexuals.

Thus, judicial overreaching is demonstrated amply below. In dismissing the moral dynamic of Amendment 2,

the court opined: "In short, prohibitions on discrimination against gay men, lesbians, and bisexuals do not imply an endorsement of any particular sexual orientation or practices." *Evans*, slip op. at 26.

The people simply do not agree, and the court's reasoning is no more persuasive than concluding *Roe* does not imply endorsement of abortion. This hypertechnical notion may have commerce in the courtroom, but most assuredly this is not how the American people, whether for or against homosexuality, or for or against abortion, understand Amendment 2 or *Roe v. Wade*. *See, e.g.*, Phil McCombs, *Remembering Thomas*, Washington Post, Feb. 3, 1995, at D5 (discussing the impact of the judiciary's "A-OK" on abortion).

Moreover, hypertechnicality reigns in the court's discussion as to whether morality, if it is even implicated, is a "compelling" or "substantial" government interest. It is unimaginable that a court could be unaware of the omnipresent theme of morality in every current debate on American public policy, across the board, much less in regard to a subject that engages a millennia of moral teaching. What is plain, however, is that, contrary to the explicit holding of this Court, the court below used "the Fourteenth Amendment [to give themselves] power to impose upon the [State] their view of what constitutes wise . . . social policy." *Dallas v. Stanglin*, 490 U.S. 19, 27 (1989).

Indeed, Amendment 2 is a vivid case in point: the moral choice posed by Amendment 2 certainly was compelling and substantial to the 1,524,117 citizens of Colorado who used the ballot box to express their views—in the end, their views of what is right and what is wrong. This is no petty exercise. As distinguished scholars have concluded, "it is not too much to say that civilization itself depends on the making of . . . distinctions (between, finally, right and wrong)." Richard John Neuhaus, *Morality and Homosexuality*, Wall Street Journal, Feb. 24, 1994, at A18. And in political terms, *what is at stake here is nothing less than, "What is the actual —and the desirable—distribution of political power [among the three coordinate branches of government] in the United States?"* *Wolfe* at 11.

This momentous social process must not be shortchanged by unwarranted judicial intervention. The consequences are plain. Far from the people shutting out homosexuals from the political process, it is the people of Colorado who are shut out by the court's ruling. Where can the people go for redress? To whom can they complain that they are not heard? At what level of political expression can they voice their consensus?

The object lesson of *Roe* looms; for in that case, as in the instant one, for all practical purposes, the public debate is being pushed from the statehouse and onto the streets.

CONCLUSION

Certainly the people of Colorado do not acquiesce in the legislative activity of their state's supreme court. Nor are they alone in their common sense that an issue that conspicuously engages a millennia of moral teaching is amenable perfectly to the process of our social contract.

The instant judicial initiative to foreclose political choice on how the people of Colorado respond to the issue of homosexuality is not only wrong at law, but wrong-headed as a matter of public policy. Such foreclosure serves only to shrink democracy, diminish our common moral universe, and obviate altogether the need for civil discourse. Thus, in a Pyrrhic victory, judicial foreclosure of public policy choices the Constitution rightly left to the people often works to disadvantage the very groups or ideas that were the object of judicial protection. Moreover, the damage to the process and orderly function of our social contract is inestimable.

For the foregoing reasons and authorities, Amicus requests that the decisions by the Supreme Court of Colorado in *Evans I* and *II* be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

Roy ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FOCUS ON THE FAMILY, LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICI* 1
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 1
ARGUMENT 3
I. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE INADEQUATE FOR THE PROTECTION OF RELIGIOUS LIBERTY 5
A. The Clash Between Gay-Rights Ordinances and the Autonomy of Religious Organizations Is More Pervasive than the Opinion Below Admits 5
B. Gay-Rights Ordinances Burden the Religiously Informed Consciences of Individuals 12
C. Religious Exemptions in Gay-Rights Ordinances Will Generate Detailed Inquiries into Religious Doctrine and Involve Administrative Officials and Inevitably the Judiciary in Ecclesiastical Questions 13
II. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE AFFIRMATIVE DEFENSES, THUS PROCEDURALLY DISADVANTAGING CLAIMS OF RELIGIOUS LIBERTY 20
III. THE UNCERTAINTY IN FIRST AMENDMENT PROTECTION OF RELIGIOUS INDIVIDUALS AND ORGANIZATIONS FACING CLAIMS UNDER GAY-RIGHTS LAWS COMMENDS AMENDMENT 2 AS A DECISIVE AND STRAIGHTFORWARD RESOLUTION OF THE ISSUE IN FAVOR OF RELIGIOUS LIBERTY ... 22
CONCLUSION 25
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784 (Minn. App. 1985), *aff'd mem.*, 389 N.W.2d 205 (Minn. 1986) 12

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 17, 22

Bouldin v. Alexander, 82 U.S. 131 (1872) 23

Bowen v. Kendrick, 487 U.S. 589 (1988) 10

Bradfield v. Roberts, 175 U.S. 291 (1899) 10

California v. Grace Brethren Church, 457 U.S. 393 (1982) 14

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TABLE OF AUTHORITIES – Continued

Page

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Page

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42 U.S.C. § 2000bb 24

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Page

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Page

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INTEREST OF THE *AMICI*

The interest of each *amici* is set forth in the appendix to this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of the Petitioners.

SUMMARY OF ARGUMENT

Whether the equal protection standard is characterized as "rational basis," "substantial justification," or "compelling interest" review,[1] Amendment 2 is justified

[1] Instead of invoking a "suspect class" theory, the Colorado Supreme Court ruled that Amendment 2 violates the Equal Protection Clause because it infringes on the fundamental right of homosexuals to participate equally in the political process. *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (*Evans II*); *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (*Evans I*).

Amici concur with petitioners that Amendment 2 should not be subjected to heightened scrutiny. The opinion below will lead to some absurd results. Legislation routinely makes distinctions between, and imposes burdens on, "independently identifiable groups" and thereby makes the group's political success more difficult. For example, suppose that as a result of local political strength the City of St. Louis grants a deduction from its municipal income tax for school tuition payments. Church-state separationists in out-state Missouri are upset and they adopt an amendment to the state constitution barring state and municipal

by the State of Colorado's compelling interest in protecting religious freedom.[2] There is a veritable explosion of instances where either individuals of faith or religious organizations are being forced to comply with gay-rights ordinances and other nondiscrimination regulations where sexual orientation describes a protected class. Amendment 2 holds considerable promise as a barrier to these restrictions on religious exercise and interventions into the internal operations of religious organizations.

Although the Supreme Court of Colorado agreed that protecting religious freedom was a compelling governmental interest, 882 P.2d at 1342, it opined that Amendment 2 is not the least restrictive means of achieving that interest, indicating that religious exemptions from gay-

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income-tax deductions for school tuition payments. Such an amendment surely inhibits the "equal political participation" of parents who enroll their children in private schools who previously had secured the city income-tax deductions. Nonetheless, it makes no sense to give such a constitutional amendment any more than rational-basis review under an equal protection challenge. Yet that is the result under *Evans I* and *II*.

[2] The trial court held that homosexuals were not a "suspect class" requiring "strict scrutiny" under the Equal Protection Clause. Respondents did not appeal that conclusion of law, thus the Colorado Supreme Court did not address the question. *Evans v. Romer*, 882 P.2d 1335, 1341 n.3 (Colo. 1994) (*Evans II*). Given the present procedural posture, it would seem that the issue of whether homosexuals are a "suspect class" is not before this Court. Nevertheless, should the Court take up the question of "suspect class" status, *amici's* argument is equally applicable to that issue, *i.e.*, the compelling government interest in protecting religious liberty justifies any burden Amendment 2 imposes upon the class.

rights ordinances would be adequate, *id.* at 1342-43.[3] The court was mistaken. The ubiquity of nondiscrimination requirements applicable to religious institutions indicates the efficacy of a measure like Amendment 2. The addition of sexual orientation to these requirements imposes serious burdens upon religious exercise that exemptions do not sufficiently protect. Applying such exemptions to religious organizations is extremely difficult, frequently involving courts in an intrusive examination of a religious institution's doctrine and practice. These disturbing implications, along with the procedural disadvantages inherent in exemptions, plainly justify the enactment of Amendment 2.

ARGUMENT

It can hardly be denied that the morality of homosexual conduct is a matter of heated national debate. It is, as well, the subject of impassioned discussion within religious denominations, local churches, the religious social-service sector, and other ecclesial organizations such as seminaries and religious universities. Theologians, clerics, and laypersons all participate in the debate, and

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[3] Because the state court framed the question before it as two fundamental rights in conflict, it failed to explain its unspoken assumption that the fundamental right to religious liberty may be vindicated only by means less restrictive to gay-equality rather than the other way around. This unexplained subordination of the First Amendment's text so stands constitutional law on its head that one would think it was gay and lesbian egalitarianism that the Congress of 1789 penned into the Bill of Rights rather than the free exercise of religion.

on both sides. Because it confronts religious belief and church autonomy, homosexual practice is a matter which the First Amendment ensures that the confessional communities may work out for themselves and in their own time.

When an interpretation of the scriptural canon is understood to warn against homosexual conduct, obviously a church's own employment practices, its schools with their attendant curricula and codes of behavior, and its social-outreach programs will reflect that moral stance. Accordingly, churches and their subsidiary groups, as well as parachurch organizations, do discriminate against those who engage in homosexual practices. Apologia for the discrimination vary widely, but the three purposes that are most often advanced are: (i) correction of the person in error (for his own well-being); (ii) communication within and without the confessional community of the scriptural teaching on homosexuality (that others may not fall into error); and (iii) protection of the traditional family (a foundation stone of civil society).

Amici's concern is with the independence of religious organizations to pursue their beliefs and practices, as each ecclesiastical body develops its own doctrine, as each defines its own approach to ministry, and as each determines its own programs for meeting human needs.[4]

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[4] *Amici* object strongly to the characterization of religious freedom as a matter of "religious privacy." As reported in *Evans II*, 882 P.2d at 1339 and 1340, apparently counsel for petitioners are prone to commit this error. Shrinking religious liberty to a matter of "privacy" reduces this venerable right to little more than protecting "intimate association." Religion in America has never been private, and attempts to confine religion to out-of-the-way society only confirm Professor Stephen L. Carter's thesis in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

Regardless of ambiguities in the outer reaches of the law concerning juridical safeguards for the autonomy of religious groups, religious pursuits must remain free of governmental interference. Institutional autonomy for religious societies is surely broad enough to include freedom from compliance with gay-rights ordinances. But, in candor, the case law is in flux and not entirely favorable. And popular opinion often runs counter to the orthodox position.

In a single, decisive step, Amendment 2 resolved all these doubts and complexities in favor of religious liberty. The Amendment thus safeguards a venerable right and holds in check expansive government, at least on this discrete but crucial point of law.

I. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE INADEQUATE FOR THE PROTECTION OF RELIGIOUS LIBERTY.

A. The Clash Between Gay-Rights Ordinances and the Autonomy of Religious Organizations Is More Pervasive than the Opinion Below Admits.

The following hypotheticals illustrate some of the concerns from the perspective of a religious institution and its interest in self-definition and autonomy:

Case 1: Bethlehem Home, a shelter for battered women, is a nonprofit, charitable corporation. It was founded five years ago by the Greater Kansas City Interchurch Coalition, a voluntary association of Pentecostal churches whose members are interested in responding to the high incidence of domestic violence. The City Council, an elected body, has before it an application for a one-time $15,000 grant to upgrade the Home's plumbing and add water sprinklers to meet fire-code requirements. As a condition on all its community-service grants, the city requires that "a grantee's governing board be representative of the community's diversity." There is currently a vacancy on the Home's Board of Directors, and the Gay and Lesbian Alliance is pressuring the City Council to deny the grant unless the vacancy is filled by a woman put up by the Alliance. The church Coalition does not want women sheltered at the Home exposed to lesbianism. The Council denies the grant.

Case 2: The Tiny Tots Center is presently organizing as a for-profit corporation. TTC will be located near a low-income, public housing project on Milwaukee's southside where the need for quality, low-cost child care is acute. The brainchild of an inner-city pastor, TTC plans to keep its fees affordable by locating rent-free in the educational wing of the Lafayette Street Church and using volunteers from the congregation as part-time staff. The Wisconsin Human Services Department will issue a license on condition, *inter alia*, that the TTC is in compliance with all municipal codes and ordinances. The city's gay-rights ordinance has a religious exemption for "bona fide religious organizations

recognized as nonprofit, tax-exempt corporations under section 501(c)(3) of the Internal Revenue Code." Being a for-profit corporation, TTC is not exempt from the ordinance. The church opposes homosexual practice. Volunteer staff will be screened by the church, and conformity to doctrine is an essential criteria. TTC is denied a license to operate.

Colorado's admittedly compelling interest in protecting the institutional autonomy of religious organizations is not satisfied by requiring that municipalities write religious exemptions into their ordinances. As the foregoing hypotheticals illustrate, implementation of the suggestion is more difficult, and such exemptions are far less adequate for the protection of religious liberty than the opinion below admits.

One of the reasons for the difficulty is that the types of gay-rights laws are far more pervasive and diverse than the state court seems to realize. Colorado's Amendment 2 does not just do away with ordinances addressing discrimination in employment and housing. Like civil-rights legislation generally, gay-rights laws can and do take a variety of remedial forms. In addition to employment and housing, there are at least four additional types of ordinances:

1. Following in the pattern of Title II of the Civil Rights Act of 1964, state and local governments have enacted legislation prohibiting discrimination in public accommodations. Unlike Title II, however, the state and local laws broadly define "public accommodations" as

reaching voluntary associations such as youth opportunity groups[5] and residential care homes. This often means that the nondiscrimination requirement extends to volunteers, as well as employees and patrons. When one of the prohibited bases of discrimination is homosexuality, religious youth groups and religious homes for youth[6] find themselves in noncompliance.

The Aspen ordinance, for example, broadly defines "public accommodations" such that a church opening its facilities to meetings of Alcoholics Anonymous would apparently have to also grant access to Act-Up. *See Evans II*, 882 P.2d at 1363 (Erickson, J., dissenting). Amendment 2 resolves these conflicts, simply and unequivocally, in favor of religious liberty.

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[5] Courts in California have held that the Boy Scouts and Girl Scouts are public accommodations. *See Curran v. Mount Diablo Council of the Boy Scouts*, 29 Cal. Rptr. 2d 580 (1994), *review granted*, 874 P.2d 901 (Cal. 1994) (discrimination on basis of sexual orientation); *Randall v. Orange County Council, Boy Scouts of America*, 28 Cal. Rptr. 2d 53, *review granted*, 874 P.2d 900 (Cal. 1994) (discrimination against atheists).

[6] Rawhide Boys Ranch is a Christian residential-care home located in New London, Wisconsin. The Ranch takes in adjudicated delinquents and boys removed from their parents' home. The Ranch hires married couples to serve as "house parents" to the boys. House parents must be Christians (a permissible criteria under the fair employment law for a religious organization) and conform to certain moral behavior. When the Ranch learned that it was subject to a gay-rights law, it asked the state legislature for an exemption. The request was twice rebuffed. *United Press International* (March 5, 1986, March 28, 1986 and November 6, 1987) (available on NEXIS).

2. State and local governments create limited public fora for the speech and speech-related activities of designated groups. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993) (public school creating forum for community organizations); *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university creating forum for student groups). However, access to the limited public fora can be conditioned on compliance with nondiscrimination on the basis of homosexuality. For example, the University of Michigan at Ann Arbor, like most state universities, provides meeting space for university-recognized student organizations. But a recently adopted condition of university recognition is nondiscrimination on the basis of homosexuality. *See* Detroit Free Press, March 23, 1989, at 6A; Detroit Free Press, September 24, 1993, at 1B; Detroit Free Press, May 20, 1994, at 10A. Resolution Revising Regents' Bylaws Section 14.06 Discrimination, University of Michigan Board of Regents (September 24, 1993). Appeals to the Board of Regents for a religious exemption fell on deaf ears. A religious student organization at the University of Illinois at Champaign enjoyed greater success, but only after administrative appeals and threats of litigation. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (describing events at the University of Illinois-Champaign). This presents problems for student religious groups, such as Inter-Varsity Christian Fellowship, Campus Crusade for Christ, and the Christian Legal Society, who select their leaders, *inter alia*, on the basis of adherence to Biblical

morality, including the avoidance of homosexual practices. Amendment 2 resolves this conflict, simply and unequivocally, in favor of religious liberty.

3. Participation in governmental assistance programs is often conditioned on compliance with civil-rights norms. Many religious organizations are eligible for such assistance, such as colleges, *see Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971), social-welfare agencies, *see Bowen v. Kendrick*, 487 U.S. 589 (1988) (teenage counseling center), and health-care facilities, *see Bradfield v. Roberts*, 175 U.S. 291 (1899) (hospital). If one of the prohibited bases of discrimination is homosexuality, religious organizations will be in noncompliance because they often impose personal behavior requirements on staff, faculty, and students.[7]

These "strings" on government assistance proliferate and can take surprising forms. For example, recently three states have begun to require nondiscrimination pledges from charities that raise funds through state employee payroll programs.[8] Civil servants in most states

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[7] A homosexual-rights organization has already made such a claim urging the termination of educational funding. *See Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 30 n.23 (D.C. App. 1987).

[8] *Nonprofits, States Clash: States Add Sexual Orientation Provisions To Requirements*, 8 World 12 (March 13, 1993). Wisconsin bans discrimination on the basis of religion, whereas Massachusetts and Pennsylvania require nondiscrimination agreements on the basis of religion and sexual orientation. In contrast, the current federal payroll-deduction program has an exception for religious organizations discriminating in

are urged to sign payroll authorizations allowing deductions for a favorite charity appearing on an approved list. To make the list, a social-welfare charity must sign an agreement not to discriminate on the bases of, *inter alia*, religion and homosexuality. This presents a coercive problem for religious social-service agencies which for doctrinal reasons set behavioral standards for their employees and volunteers. Amendment 2 resolves these conflicts, simply and unequivocally, in favor of religious liberty.

4. State and municipal tax exemptions, credits, and deductions are often tied to compliance with civil-rights norms. For example, the Minnesota tuition-tax deduction upheld in *Mueller v. Allen*, 463 U.S. 388 (1983), was conditioned on compliance with the state human-rights law. *Id.* at 390 n.1. Similarly, Iowa's tuition and textbook tax deduction/credit for nonpublic school parents mandates nondiscrimination as to the selection and treatment of staff and students.[9] There is no logical reason why these

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employment on a religious basis and makes no reference to homosexuality.

[9] In 1987, Iowa modified its income-tax code to permit taxpayers sending dependents to nonpublic primary and secondary schools to claim a deduction for the costs of tuition and textbooks. Iowa Code §§ 422.9, 422.12 (1993). Non-itemizing taxpayers may claim a credit. Iowa Code § 422.12(2) (1993). To qualify, the nonpublic school must be accredited by the state. Iowa Code § 256.11 (1993). Accreditation is conditioned on compliance with Iowa's civil rights act. Iowa Code § 216 *et seq.* (1993). Although a religious organization may discriminate on the basis of religion, the exemption obtains only if the position relates to a religious purpose of the institution. Iowa Atty. Gen. Op. (Chiodo), February 23, 1978.

tax benefits could not be tied to nondiscrimination on the basis of homosexuality. Amendment 2 heads off any such budding conflict, resolving the matter, simply and unequivocally, in favor of religious liberty.

B. Gay-Rights Ordinances Burden the Religiously Informed Consciences of Individuals.

The Colorado Supreme Court acknowledged that the adequacy of religious exemptions to serve the cause of persons of faith was an open question. As candidly stated by the court below, when the First Amendment has been raised in the face of civil-rights laws, assertions of religious liberty have met with "mixed results." *Evans II*, 882 P.2d at 1343 n.7. *Evans II* cited the case concerning a landlord having to lease premises to a couple engaging in sexual activities at odds with the landlord's religious beliefs. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1995) (holding that state has compelling interest in enforcing law prohibiting discrimination on the basis of marital status, therefore religious objection of landlord to renting to co-habiting unmarried persons is overridden). Other individuals of faith have clashed with gay-rights ordinances and lost. For example, the members and operator of a health club, citing concerns of body modesty based on religious belief, had no success in their attempt to exclude homosexuals; *see Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. App. 1985), *aff'd mem.*, 389 N.W.2d 205 (Minn. 1986); a minister, fired from an

appointed position on a municipal human-rights commission because of his statements concerning belief in Biblical teachings regarding homosexuality, was found not to have had either his free-speech or free-exercise rights violated; *see Lumpkin v. Jordan*, ___ F. Supp. ___, 1994 WL 669852 (N.D. Cal. 1994); and only after a partial victory on appeal did one pastor win the right to challenge a state-wide gay-rights law that is so broadly drafted that the act punishes an individual for refusing to trade with a homosexual business, for "inciting" others to boycott a homosexual business, and for "aiding, abetting or inciting" others to discriminate against homosexuals in ways that otherwise violate the act. *Presbytery of New Jersey v. Florio*, 40 F.3d 1454 (3d Cir. 1994). The act is so broad that plaintiff's Sunday sermon could get him arrested.

In straightforward fashion, Amendment 2 would sort out each of these cases and resolve them on the side of freedom of speech and freedom of religion.

C. Religious Exemptions in Gay-Rights Ordinances Will Generate Detailed Inquiries into Religious Doctrine and Involve Administrative Officials and Inevitably the Judiciary in Ecclesiastical Questions.

The court below held that religious exemptions in gay-rights ordinances would satisfy Colorado's admittedly compelling interest in preserving religious liberty. This presumes it will be easy to determine which persons of faith and which religious organizations qualify for the exemption. But the task is not easy, and the fact-finding

needed to make such determinations raise new and difficult First Amendment problems of their own.

Religious exemptions appearing in legislation are basically of four types. First, there are exemptions for "churches and other houses of worship." But this excludes religious organizations unaffiliated with any church. The constitutionality of such a narrow exemption was the issue raised but never decided in *California v. Grace Brethren Church*, 457 U.S. 393 (1982).[10] Religious organizations comprise quite a long and differentiated list: everything from preschools to nursing homes to soup kitchens to shelters for battered women to financial-counseling centers.[11] In non-hierarchial churches, common

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[10] The federal unemployment tax law exempts services performed while in the employment of a church. In *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the Court held that the word "church" in the tax law included schools that have no separate legal existence from a church. *Grace Brethren* presented the question whether the exemption was applicable to a school separately incorporated from a church, and, if not, whether the discriminatory nature of the legislative exemption violated the First Amendment. Because this Court dismissed on jurisdictional grounds, there still is no resolution of the First Amendment question.

[11] A nonexhaustive list includes preschools and child day-care centers; temporary shelters for abused children; foster homes and adoption placement agencies; residential-care or group-care homes for abused or neglected children and adjudicated juvenile offenders; adolescent or teen counseling centers; crisis-pregnancy counseling centers; maternity homes for women with crisis pregnancies; temporary shelters for battered women; rehabilitation centers for alcoholics, drug abusers, and the unemployed; AIDS hospices; prison ministries, police and prison chaplaincies; halfway houses for adults convicted of crimes; storehouses of free (or reduced-price) food, used

within Protestantism, many religious organizations are entirely unconnected to a church.

Second, there are exemptions for religious organizations when discriminating on the basis of religion in the filling of positions requiring "religious" duties but not when filling "secular" jobs.[12] This raises the issue presented in *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd mem.*, 456 U.S. 951 (1981), striking down an ordinance that charged minor city officials with the issuance

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clothing, and household items; centers for free meals (soup kitchens) and temporary shelters for the homeless (rescue missions); low-income housing renovation programs; refugee aid and resettlement; disaster relief; clearinghouses for volunteers rendering home-based care to the disabled; long-term care facilities for the disabled, retarded, and mentally ill; long-term care facilities for the elderly (retirement, nursing, and invalid homes); elderly day-care centers; centers for vocational training or employment of the disabled; literacy and English-as-a-second-language programs; hospitals and community-health clinics; dispute resolution and legal-aid centers; draft counseling centers; financial-counseling centers; marital and family-counseling centers; recreational programs, summer camps and retreat centers for youth and adults; and, support groups of every stripe for persons suffering from life's many vicissitudes.

Compare F. Ernest Johnson, ed., *Religion and Social Work* 19-25 (Harper, 1956), *with* Phillip R. Popple and Leslie Leighninger, *Social Work, Social Welfare, and American Society* 105-108 (Allyn & Bacon, 2d ed. 1993).

[12] The clash between equality and liberty over the applicability of civil-rights acts to "secular" jobs at pervasively religious organizations is a familiar one. *See, e.g., EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

of a permit contingent on a determination of whether the collection of money solicited by a church was for "secular" or "spiritual" purposes. The lower courts in *Espinosa* struck down the ordinance because it caused detailed probing into religious motives and doctrine. Moreover, this Court has recognized the First Amendment problems when the government attempts to divine what jobs are sufficiently related to the mission of a religious organization as to merit exempt status. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987); *id.* at 344-45 (Brennan, J., concurring).

Third, there are exemptions for religious organizations when discriminating on the basis of religion, but not for discrimination motivated by race, national origin, gender, disability and age.[13] Thus, the question arises as to whether an employment decision was religiously motivated and hence lawful, or not religiously motivated and hence unlawful.[14] Is discrimination on the basis of homosexuality religiously motivated? This can be a very difficult question because it goes to motive. Religious defendants will raise the religious-exemption defense. In

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[13] This is the sort of religious exemption added in 1972 to Title VII of the Civil Rights Act of 1964. Accordingly, under federal law religious organizations may discriminate in employment in favor of co-religionists. The exemption was held not to violate the Establishment Clause in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). For discussion about the congressional concern over the narrowness of the pre-1972 exemption and the free-exercise of religion, *see id.* 336.

[14] Typical would be the question whether a discharge for out-of-wedlock pregnancy is based on religion or gender. *See Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980) (prohibiting dismissal of parochial school teacher for pregnancy out-of-wedlock).

the latter instance, the plaintiff's position will be that the professed religious motive is a pretext.[15] Such detailed judicial inquiries into religious matters, including doctrine and clerical motives, have been strongly discouraged by this Court. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to decide what is a legitimate "religion" for purposes of issuing solicitation permit).

Finally, there are exemptions for "religious" organizations as distinct from "nonreligious" organizations. Churches and other houses of worship qualify easily enough, but more difficult are organizations said to be "religious" but that make no claim to being a "church." The most difficult problem is determining just how "religious" an organization must be to qualify as "religious" for purposes of the exemption. Some schools and social-welfare agencies are at the very "core" of the given religion. Others are parachurch groups, meaning that they are not under the corporate control of any church of denomination, albeit they may be explicitly and self-consciously Protestant, Catholic, Jewish, etc. *Compare* F.

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[15] The situation is similar to that said to present a "serious First Amendment question" in *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-04 (1979). In order to avoid federal entanglement into the employment relationship between religious school officials and lay teachers, in *Catholic Bishop* the Court construed the labor relations act as not applying to parochial schools.

Ernest Johnson, ed., *Religion and Social Work* 17-19 (Harper 1956), *with* Phillip R. Popple and Leslie Leighninger, *Social Work, Social Welfare, and American Society* 105-108 (Allyn & Bacon, 2d ed. 1993). There are many different ways of gauging the degree of this "connectedness," *e.g.*, the extent to which religious creed guides decision-making; the extent of religious content of the curriculum or program; the degree of control by a parent church; the extent to which the governing board is comprised of officers or members of the parent church; whether officers and staff are selected exclusively from members of the parent church; the extent of financial support by the parent church; the extent to which funding is supplied by contributors of the same faith; and the extent to which the clientele served are exclusively of the same faith. Quite apart from the degree of connectedness, the extent to which the social-service agency has retained its religious fervor and distinctiveness will vary with each organization. If the organization is no longer very "religious," presumably the religious exemption in a gay-rights ordinance is unavailable.

The Internal Revenue Service is the most experienced agency with these determinations, but it hardly operates without controversy. *See* Charles Whelan, *Governmental Attempts to Define Church and Religion*, 446 The Annals, AAPSS 32 (Nov. 1979); Charles Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 Fordham L. Rev. 885 (1977); Edward M. Gaffney, Jr., *Governmental Definition of Religion: The Rise and Fall of the IRS Regulation of an "Integrated Auxiliary" of a Church*, 25 Valparaiso Univ. L.Rev. 203 (1991). The distinction in the exemption between "religious" and "nonreligious" is not

unlike the general difficulty in defining "religion" for purposes of the First Amendment. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. F. 579; Sharon I. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L. Rev. 313 (1980). Occasionally the task has to be performed by the judiciary, but it should be avoided whenever possible.

The form and number of religious organizations is far more variate and complex than is commonly appreciated.[16] And the degree of religious "fervor" of these organizations runs from the intensely confessional to groups that have become so much a part of the "worldly" culture that they are not easily differentiated from their secular counterparts. *See* H. Richard Niebuhr, *Christ and Culture* (1951) (typology of five paradigms of Christian ways of relating to the world).

The foregoing parameters concerning the nature of religious organizations are relevant depending on how a municipality has drafted the religious exemption in its ordinance. They reveal the difficulty a court will have in determining if a particular exemption applies to a given organization that is more or less related to a central religious body like a synagogue or church. Hence, the parameters bear upon the First Amendment question of institutional autonomy. Taken together, these considerations render unwieldy the suggestion by the state

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[16] The United States presently has over 1,600 denominations, 44 percent of them non-Christian. Over half these denominations have first organized since 1960. J. Gordon Melton, *Encyclopedia Of American Religions* (4th ed., 1995).

supreme court that religious exemptions from gay-rights laws are adequate.

The adoption of Amendment 2 made the foregoing tasks unnecessary. The use of religious exemptions in gay-rights ordinances makes performing these unwelcome tasks inevitable. Only Amendment 2 cleanly and quickly vindicates the state's compelling interest in safeguarding religious freedom.

II. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE AFFIRMATIVE DEFENSES, THUS PROCEDURALLY DISADVANTAGING CLAIMS OF RELIGIOUS LIBERTY.

A religious exemption in an ordinance provides an affirmative defense to a discrimination claim. There are procedural disadvantages to an affirmative defense as opposed to a plaintiff not being able to state a *prima facie* claim in the first instance.[17]

With an affirmative defense, the defendant charged with discrimination carries all the burdens: the burden of pleading, the burden of producing evidence demonstrating the exemption's applicability, and the risk of nonpersuasion. The burden of demonstrating that the scope of the exemption is broad enough to include the defendant

[17] This procedural point is also applicable where the gay-rights ordinance is backed by criminal sanctions. The Aspen ordinance, for example, imposes criminal penalties for discrimination on the basis of sexual orientation in employment, housing, and public accommodations. Aspen has a religious exemption, but it is too narrow to protect religious freedom in many instances. *See Evans II*, 882 P.2d at 1363.

can be quite difficult, as discussed *supra* Part I. The risk of nonpersuasion when the finder of fact is a jury can present special difficulties for religious groups. Juries often find religion puzzling (except for their own), and hostility is common when religious groups demand an exemption from social duties borne by all others.[18]

Amendment 2 disables plaintiffs from even stating a claim upon which relief can be granted. Hence, suits may be handled summarily on motions to dismiss or summary judgment. Indeed, suit will probably never be filed or even threatened, thereby avoiding any "chilling" of First Amendment activity. Religious groups understandably fear protracted and expensive litigation, with its attendant bad publicity, for most are nonprofits that exist on charitable contributions and hence their good image and the public's beneficence.

Any experienced trial lawyer will see immediately that it is fanciful to equate religious exemptions in gay-rights ordinances with Amendment 2's straightforward protection of religious free exercise and institutional autonomy.

[18] Concerning likely prejudice or incomprehension by juries when it comes to judging religious claims, *cf. United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) ("When one comes to [a jury] trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.").

III. THE UNCERTAINTY IN FIRST AMENDMENT PROTECTION OF RELIGIOUS INDIVIDUALS AND ORGANIZATIONS FACING CLAIMS UNDER GAY-RIGHTS LAW COMMENDS AMENDMENT 2 AS A DECISIVE AND STRAIGHTFORWARD RESOLUTION OF THE ISSUE IN FAVOR OF RELIGIOUS LIBERTY.

The extent to which the First Amendment presently protects the autonomy of religious organizations is unclear. Although a gay-rights law cannot be enforced if it purposefully discriminates against religion, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993), a law's discriminatory effect is not, without more, violative of the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Even in the face of purposeful targeting of religious practices, government may proceed to enforce a non-discrimination law if the law furthers a compelling interest.[19] Without Amendment 2 in place, it is not farfetched

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[19] For example, the eradication of racial discrimination in education has been found compelling so as to overcome conflicting religious practices in *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). A conflict between sex discrimination and contrary religious practices was the issue on the merits presented in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). But the issue was left unanswered when this Court reversed and remanded with directions to the lower federal court to abstain. When nondiscrimination norms were attached to federal funding, claims by a religious college for institutional autonomy were rebuffed in *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984). But the college in *Grove City* did not explicitly rely upon the Religion Clauses since the matter was not confessional with the college, thus leaving unresolved the viability of the First Amendment defense.

to anticipate in the near future a court holding gay-equality a compelling interest overriding religious liberty. Already one lower federal court has held that a church-affiliated university must comply with a municipal gay-rights law. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (Roman Catholic university need not formally recognize homosexual student group, but university must provide services to homosexual group equal to services provided other student organizations).

Generally applicable taxation and labor regulation of religious organizations have been upheld by this Court, so long as similarly situated nonreligious organizations are subject to the same legislation. *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 383-98 (1990) (sales and use taxes); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985) (minimum wage and maximum hours laws). On the other hand, there is strong language by this Court concerning the imperative of autonomy for religious organizations in a long line of cases involving property disputes. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976) (civil courts may not probe into procedures churches used to remove clerics); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (in resolving church property disputes, civil courts may not adjudicate questions of church doctrine); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) (judicial interference hazards inhibiting the free development of religious doctrine and implicating secular interests in matters of solely ecclesiastical concern); *Gonzalez v. Archbishop*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *see also*

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (ability of religious organizations to define and carry out their missions); *id.* at 342-43 (Brennan, J., concurring in the judgment) (religious organizations need to be able to discriminate in favor of co-religionists as employees).

Typical is *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952), to the effect that the First Amendment contains "a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." But doubt remains concerning the extent to which these intra-church cases, entailing as they do property disputes, protect religious organizations from gay-rights legislation that is generally applicable and neutral as to religion.

In 1993, Congress adopted and the President signed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4. However, its constitutionality is being questioned,[20] and, in any event, it remains to be seen how forcibly the courts will enforce the act's provisions. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994), and Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994).

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[20] One federal district court has found the act unconstitutional. *Flores v. City of Boerne*, ___F. Supp. ___, 1995 WL 118446 (W.D. Tex. 1995), *appeal docketed*, No. 95-00067 (5th Cir. Mar. 22, 1995).

The compatibility of religious exemptions with the Establishment Clause also remains in doubt. This Court upheld a legislative exemption in Title VII of the Civil Rights Act of 1964, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). However, concurring opinions signed by four Justices indicated that they would limit the constitutionality of religious exemptions to nonprofit organizations. *Amos*, 483 U.S. at 340 (1987) (Brennan, J., concurring in the judgment, joined by Marshall, J.); *id.* at 346 (Blackmun, J., concurring in the judgment); *id.* at 349 (O'Connor, J., concurring in the judgment). This suggests that religious exemptions will be closely examined, and those too broad in scope remain open to Establishment Clause attack.

Amendment 2 avoids all these uncertainties in the law and resolves the matter in favor of religious liberty for religious organizations.

CONCLUSION

The social agenda of gays, lesbians, and bisexuals is moral legitimacy for their sexual practices. They pursue this cause with vigor. Religion, at least orthodox and traditional religions, generally deny them moral legitimacy. This places religion foursquare in their path. Accordingly, religious persons and religious groups – and hence free exercise and institutional autonomy – are not a mere side issue in this case. *See* Richard F. Duncan, *Who Wants To Stop The Church: Homosexual Rights Legislation, Public Policy, And Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994).

Amendment 2 is an effective way of protecting religious liberty. Contrary to the state supreme court, religious exemptions to gay-rights ordinances do not adequately protect the freedom of religious individuals and the autonomy of religious institutions. Such ordinances affect religious entities in more ways than is commonly presumed, and the various types of exemptions commonly seen are vexing to apply. The compelling nature of protecting religious liberty justifies any burden upon equal protection interests imposed by Amendment 2.

More broadly, homosexuality is an issue about which there is vigorous, often intransigent, debate. The wide range of thoughtful, studied positions on this question reflect the intellectual and moral diversity of this Nation's people. *Amici* respectfully suggest that this Court should not preempt or debilitate such a robust but complex discussion. Instead, the context of this case calls for application of the passive virtues.

For the foregoing reasons and authorities, *amici* request that the decision of the people of the State of Colorado be respected and the decisions of the Supreme

Court of the State of Colorado in *Evans I* and *II* be reversed.

Respectfully submitted,

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APPENDIX

INTEREST OF THE *AMICI*

The **Christian Legal Society**, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious exercise and autonomy in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but

only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Catholic League for Religious and Civil Rights** is the nation's largest Catholic civil rights organization. Founded in 1973 by the late Father Virgil C. Blum, S.J., the Catholic League defends the right of Catholics – lay and clergy alike – to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard both the religious freedom rights and the free speech rights of Catholics whenever and wherever they are threatened.

The **Southern Baptist Convention (SBC)** is the nation's largest Protestant denomination, with over 15.6 million members in over 39,900 local churches. The **Christian Life Commission (CLC)** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in

national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

Focus on the Family is a California religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week, many of which express concern over the evident attempt of homosexual persons who seek to obtain civil and other rights which are greater than those afforded to other persons. Focus on the Family represents Americans, numbering in the hundreds of thousands, who oppose the granting of special rights to homosexuals, or the creation of a new, legally-recognized status of homosexuality which will lead to the extension of special protection to those persons who have chosen a particular form of behavior.

The **Lutheran Church-Missouri Synod** is the second largest Lutheran denomination in the United States. It has approximately 6,000 member congregations which, in turn, have approximately 2,600,000 individual members.

In 1973, the congregations of the Synod in convention passed the following resolution:

Resolution 2-04

"WHEREAS, God's Word clearly identifies homophile behavior as immoral, and condemns it (Lev. 18:22; 20:13 and Rom. 1:24-27); and

WHEREAS, The Law and the Gospel of Jesus Christ are to be proclaimed and applied to all conditions of mankind; therefore be it

Resolved, That the Synod recognize homophile behavior as intrinsically sinful; and be it further

Resolved, That the Synod urge that the Law and Gospel of the Scriptures be applied to homophiles as appropriate with a view toward ministering the forgiveness of our Lord Jesus Christ to any and all sinners who are penitent . . . . "

As a result of its deeply-held religious belief on homosexual behavior, the Council of Presidents of The Lutheran Church-Missouri Synod in 1991 adopted "Guidelines for Ecclesiastical Supervisors of The Lutheran Church-Missouri Synod in Addressing Instances of Homosexuality in the Lives of Professional Church Workers". These Guidelines are to be followed when professional church workers, including pastors and teachers, are found to be homosexual or to have engaged in homosexual behavior.

Laws prohibiting entities, including churches and religious organizations, from acting as they deem proper with respect to homosexual employees, based upon strongly-held religious beliefs, infringe upon the free

exercise of religion. Amendment 2 protects the free exercise of religion of religious entities in Colorado with respect to homosexuality and homosexuals and should be upheld.

The **National Association of Evangelicals (NAE)** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

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ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN CENTER FOR LAW AND JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.4, the American Center for Law and Justice Family Life Project (ACLJ) seeks leave to file a brief amicus curiae in support of petitioners. In support of its motion, the ACLJ states:

1. The ACLJ has received consent to file its brief from Timothy M. Tymkovich and Jean E. Dubofsky, counsel for petitioners and several of the respondents in this case. Copies of the letters of consent are being submitted along with this motion.

2. On April 18, 1995, counsel employed by the ACLJ spoke over the telephone with John P. Worcester, counsel for the remaining respondents City of Aspen and City Council of Aspen. Mr. Worcester informed ACLJ counsel that his clients would not consent to the filing of any amicus briefs, but that his clients would not oppose any amicus briefs being filed.

3. As noted more fully in the Interest of Amicus section in the brief, ACLJ attorneys have participated as counsel in a number of cases before this Court. Based on an examination of the Petition for Certiorari and the briefs supporting and opposing that petition, ACLJ counsel believe that the ACLJ's brief brings relevant matter to the Court that is not already before the Court and will be of help to the Court in deciding this case.

WHEREFORE, the ACLJ respectfully asks that this Court grant the ACLJ leave to file its brief amicus curiae in support of petitioners.

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QUESTION PRESENTED

Whether a state, having a rational basis to do so, may make it more difficult to enact legislation that would establish intrusive regulation of private behavior and property and would cause conflicts with the religious liberty of many of the state's citizens, to prevent discrimination against members of a non-suspect class that is defined by its members' conduct rather than by any immutable characteristic, that enjoys considerable political influence, and whose members are economically advantaged compared to other similarly-situated citizens.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 3

I. THIS COURT HAS NOT RECOGNIZED AND SHOULD NOT RECOGNIZE THE FUNDAMENTAL RIGHT TO EQUAL PARTICIPATION IN THE POLITICAL PROCESS INVENTED BY THE COLORADO SUPREME COURT 4

II. UNDER TRADITIONAL EQUAL PROTECTION ANALYSIS, COLORADO CONSTITUTIONAL AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE 9

A. Homosexuals, Bisexuals, and Lesbians Do Not Constitute a Suspect Class 9

B. Amendment 2 Is Rationally Related to Several Legitimate State Interests 13

CONCLUSION 16

TABLE OF AUTHORITIES

Attorney General v. Desilets, 636 N. E. 2d 233 (Mass. 1994) .. 15

Ben-Shalom v. Marsh, 881 F. 2d 454, 464 (7th Cir. 1989) 10, 11, 13

Board of Airport Commisioners v. Jews for Jesus, 482, U.S. 569 (1987) 2

Board of Education v. Mergens, 496 U.S. 226 (1990) 2

Bowers v. Hardwick, 478 U.S. 186 (1986) 3, 12

Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). 2, 12-13

Evans v. Romer, 854 P. 2d 1270 (Colo. 1993) 5, 7, 8, 9

Evans v. Romer, 882 P. 2d 1335 (Colo. 1994) 5, 15

Frisby v. Schutlz, 487 U.S. 474 (1988) 2

Gordon v. Lance, 403 U. S. 1 (1971) 5, 6

Graham v. Richardson, 403 U. S. 365 (1971) 10

Heller v. Doe, 113 S. Ct. 2637 (1993) 4-5, 13, 15

High Tech Gays v. Defense Industry Clearance Office, 895 F. 2d 563 (9th Cir. 1990) 10, 11

Hunter v. Erickson, 393 U. S. 385 (1969) 4, 5, 6, 9

James v. Valtierra, 402 U. S. 137 (1971) 4, 5, 6, 8-9

Table of Authorities Continued

Korematsu v. United States, 323 U. S. 14 (1944) 10

Lalli v. Lalli, 439 U. S. 259 (1978) 10

Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993) 1-2

Massachusetts Board of Retirement v. Murgia, 427 U. S. 307, 313 (1976) 10

Mississippi University for Women v. Hogan, 458 U. S. 718 (1982). . ..... .10

National Gay Task Force v. Board of Education, 729 F. 2d 1270, 1273 (10th Cir. 1984) 10

New Orleans v. Dukes, 427 U. S. 297 (1976) 10

Padula v. Webster, 822 F. 2d 97 (D. C. Cir. 1987) 10, 13

San Antonio School District v. Rodriquez, 411 U. S. 1 (1973) . 10

Smith v. Fair Employment and Housing Commission, 30 Cal. Rptr.2d 395 (Cal. App. 1994), *review granted*, 880 P.2d 111 (Cal. 1994). . . .. .15

Steffan v. Perry, 41 F. 3d 677 (D. C. Cir. 1994) 10, 11, 12

United States v. Kokinda, 497 U.S. 720 (1990) 2

Washington v. Seattle School District No. 1, 458 U. S. 457 (1982). 5

Table of Authorities Continued

Watkins v. United States, 847 F. 2d 1329, (9th Cir. 1988), *vacated*, 875 F. 2d 699 (9th cir. 1989) 11-12

Woodward v. United States, 871 F. 2d 1068 (Fed. Cir. 1989) .... .10, 11, 13

Constitutional Provisions:

U.S. Const. amend. 1, cl. 2 16

Colo. Const. art. II, § 30b (Amendment 2) ..... 2, *passim*

Other Materials:

Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 406 (1994) 10, 11, 12-13, 16

Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N. Y. Times, Oct. 11, 1992, §6 (Magazine), at 20 11

A Testament of Hope: The Essential Writings of Martin Luther King, Jr. (James Melvin Washington ed. 1991) 13

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BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ has argued or participated as amicus curiae in numerous cases in this Court. See,

e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). ACLJ attorneys also have litigated cases involving the conflicts between state anti-discrimination laws and religious liberties in courts across the country.

The ACLJ Family Life Project recognizes the family as the primary social and religious institution of any just society. The Family Life Project is committed to the two-parent, marriage-bound family as the primary mediating institution of civilization, and to efforts to defend the family against all attempts to undermine its sovereignty, primacy, and importance.

The ACLJ, in its dedication to defending the rights of religious believers, is committed to defending the family as long understood within the classical Judeo-Christian tradition as a "domestic church," or, "church in the home." These phrases, hearkening back centuries, imply that the believing family is itself a religious institution. The American Center for Law and Justice Family Life Project submits this brief in support of the petitioners because of the inevitable conflict between religious belief and laws banning discrimination based on sexual orientation. Amendment 2, Colo. Const. art. II § 30b, the Colorado constitutional provision at issue in this case, serves the legitimate purpose of (among others) protecting Colorado citizens' religious liberties from unnecessary and intrusive government regulation on behalf of a class whose members do not need special government protection and is a class defined by conduct that undermines the traditional marriage-bound, two-parent family. The ACLJ Family Life Project urges this Court to reverse the Colorado Supreme Court's decision striking down Amendment 2.

SUMMARY OF ARGUMENT

While it is true that Amendment 2 singles out homosexuals for special treatment, that treatment does not violate the Equal Protection Clause. None of the normal criteria for determining that a particular class of people is a suspect class applies to homosexuals. First, homosexuals are not a group in need of special protection from majoritarian processes. Homosexuals as a group are comparatively more affluent and better educated than similarly situated heterosexuals. Homosexuals also are not a politically powerless minority. Second, homosexuality, unlike race, national origin, and sex, is not an immutable characteristic that is irrelevant to personal character. Rather, homosexuals as a class are defined by their sexual proclivities and conduct. This Court has held in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that homosexual conduct is not constitutionally protected. Moreover, that conduct is at least morally controversial; that a person is known to be homosexual, therefore, tells us much about the person's character because it tells us that person engages in or desires to engage in morally controversial conduct. A classification based on conduct that bears a rational relationship to an assessment of character is much different than classifications based on skin color or national origin, factors that are immutable and irrelevant to character.

Despite the fact that homosexuals do not constitute a suspect class, the Colorado Supreme Court applied strict scrutiny to strike down Amendment 2. The Court did so by inventing a new "fundamental right to equal participation in the political process." In creating this right, the court placed great reliance on a line of cases from this Court that considered state laws placing special burdens on the enactment of legislation desired by identifiable groups of voters. But those cases in that line that applied strict scrutiny did so not because a fundamental right was involved but because the identifiable groups singled out were suspect classes. When suspect classes were not involved, this Court did not apply strict scrutiny. Compare

Hunter v. Erickson, 393 U.S. 385 (1969) (striking down a state referendum requirement placing special burdens on laws benefitting racial minorities) with *James v. Valtierra*, 402 U.S. 137 (1971) (upholding a state law requiring voter approval of low-income public housing). Thus, this Court never has recognized the "fundamental right" that the Colorado Supreme Court has invented.

Where a law neither implicates a fundamental right nor draws suspect classifications, the law does not violate the Equal Protection Clause if it rationally relates to a legitimate government interest. Amendment 2 furthers at least three legitimate state interests: Amendment 2 protects property and associational rights by making it more difficult to enact laws restricting the people's right to associate and use their property; Amendment 2 allows the state to preserve its civil rights enforcement resources for use in protecting traditional suspect classes more in need of protection than homosexuals; and Amendment 2 protects religious liberty by making it harder to enact laws that would create conflicts between religious conviction and legal duty. Because Amendment 2 rationally relates to legitimate state interests, does not draw a suspect classification, and impinges on no fundamental right, this Court should reverse the Colorado Supreme Court's decision and hold that Amendment 2 does not violate the Equal Protection Clause.

I. THIS COURT HAS NOT RECOGNIZED AND SHOULD NOT RECOGNIZE THE FUNDAMENTAL RIGHT TO EQUAL PARTICIPATION IN THE POLITICAL PROCESS INVENTED BY THE COLORADO SUPREME COURT.

Under traditional equal protection analysis, "[A] classification neither involving fundamental rights nor proceeding along suspect lines" is presumed valid and violates the Equal Protection Clause only if the classification does not rationally relate to some legitimate government purpose. *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993). The respondents claim that Amendment 2 unfairly singles

out homosexuals[1] by creating special burdens to enacting legislation favorable to homosexuals. But the respondents did not challenge in the Colorado Supreme Court the trial court's finding that homosexuals are not a suspect class. *Evans v. Romer*, 882 P.2d 1335, 1341 n. 3 (Colo. 1994) (*Evans II*). The Colorado Supreme Court did not find expressly that homosexuals are a suspect class. Instead, the court applied strict scrutiny, rather than rational basis analysis, to strike down Amendment 2 because the court found that Amendment 2 implicated the "fundamental right to participate equally in the political process" by "'fencing out' an independently identifiable class of persons"–homosexuals. *Id.* at 1339; *Evans v. Romer*, 854 P. 2d 1270, 1282 (Colo. 1993) (*Evans I*).

The Colorado Supreme Court cobbled this right together from various strands of case law. But the Court found the right's "most explicit, and nuanced, articulation" in cases involving "legislation which prevented the normal political processes from enacting particular legislation desired by an identifiable group of voters," *Evans II*, 854 P. 2d at 1279. Cases in that line include *Hunter v. Erickson*, 393 U. S. 385 (1969), *James v. Valtierra*, 402 U. S. 137 (1971), *Gordon v. Lance*, 403 U. S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U. S. 457 (1982).

As dissenting Justice Erickson in the Colorado Supreme Court and other amici to this Court have ably demonstrated, these cases do not support the Colorado Supreme Court's finding that a fundamental right to equal participation in the political process exists. See *Evans II*, 882 P. 2d at 1357-59 (Erickson, J., dissenting); *Evans I*, 854 P. 2d at 1296-1300 (Erickson, J., dissenting); Petition for Certiorari at 8-14; Brief of Amici Curiae States in Support of Petition for Certiorari at 4-9; Brief Amicus Curiae Colorado for Family Values in Support of Petition for Certiorari at 9-11. As

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[1] For convenience, we will refer collectively to male homosexuals, bisexuals, and lesbians as homosexuals.

Justice Erickson and the other amici have demonstrated, when this Court has applied strict scrutiny in cases such as *Hunter* and *Washington*, it has done so not because of any fundamental right to equal participation but because the special burdens placed on enacting certain legislation in those cases discriminated against suspect classes.

Thus, where states made it more difficult to enact legislation that would benefit racial minorities, the paradigm suspect class, this Court applied strict scrutiny and found violations of the Equal Protection Clause. See *Hunter*, 393 U.S. at 389-92 (striking down a referendum requirement that put special burdens on the enactment of fair housing legislation that would benefit racial minorities); *Washington*, 458 U. S. at 467-87 (striking down a state constitutional amendment requiring state-wide approval of local decisions to bus school children to desegregate schools). But where race was not involved, the Court refused to apply strict scrutiny to strike down state laws simply because those laws made it more difficult to enact legislation that would benefit a certain group of people. See *James*, 402 U.S. at 140-42 (upholding a state constitutional amendment requiring voter approval of low-rent public housing projects because the amendment did not make race-based distinctions); *Gordon*, 403 U. S. at 4-7 (upholding state constitutional provisions requiring three-fifths voter approval for all bond issues because that provision "singles out no 'discrete and insular' minority for special treatment"). As this Court explained in *Hunter*, "[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications." 393 U. S. at 391-92 (internal quotations and citations omitted).

The Colorado Supreme Court justified applying strict scrutiny to Amendment 2 by distinguishing between state laws that

single out "independently identifiable groups" and those that do not. Thus, state laws placing special burdens on the enactment of certain legislation violate the fundamental right to participate in the political process only if those laws seek to make it more difficult to enact laws benefitting groups identified "apart from the groups created by the [challenged] statute itself." *Evans I*, 854 P. 2d at 1282. Thus, this reasoning goes, because the provisions in *Hunter* and *Washington* targeted laws benefiting racial minorities, groups identifiable by something other than their members' desire to have certain legislation enacted in their behalf, those laws violated the fundamental right to participate and required strict scrutiny analysis. On the other hand, since people favoring bonded indebtedness are defined as a group only by their favoring bonded indebtedness, the constitutional provision in *Gordon* that made it more difficult to incur such debt did not violate the right to political participation. It follows, at least in the view of the Colorado Supreme Court and the respondents, that Amendment 2 violates the right to equal participation because it targets laws benefitting homosexuals, a group defined by something other than the group's members' preferences for laws banning discrimination against homosexuals.

There are at least two problems with this distinction. The first is that the distinction makes no sense if the right at issue is the "right to participate in the political process." *Evans I*, 854 P. 2d at 1279. It is true that homosexuals would benefit from anti-discrimination laws making homosexuality a forbidden ground for decision. Yet, it would be presumptuous to assume that all homosexuals support such anti-discrimination laws (just as it would be presumptuous to assume that all blacks or women favor anti-discrimination laws). It also would be presumptuous to assume that *only* homosexuals support anti-discrimination laws protecting homosexuals. Indeed, the fact that more than 46 % of Colorado citizens who voted opposed Amendment 2 raises (at least) a strong inference that anti-discrimination laws protecting homosexuals enjoy support among many who are not homosexual.

If what is at issue in this case really is the right to participate in the political process, it is logical to conclude that only those who actually *favor* homosexual rights laws are being denied that right because it is only people who seek to enact homosexual rights laws who face the higher burden that Amendment 2 establishes. This class is not defined by homosexuality, since it includes both homosexuals and heterosexuals and also excludes some homosexuals.[2] Rather, the class is defined by support for the type of laws Amendment 2 makes more difficult to enact. That is, the group denied the right to participate is not "independently identifiable apart from the group created by [Amendment 2] itself." This, however, is the very type of group to which the Colorado Supreme Court stated the fundamental right to participate does not extend. *Evans I*, 854 P. 2d at 1282.

Besides being illogical, the Colorado Supreme Court's purported distinction also fails to explain this Court's decision in *James v. Valtierra*. In *James*, this Court refused to apply *Hunter* to strike down a California constitutional provision requiring voter approval of any low-income public housing project. 402 U. S. at 140-42. As Justice Marshall recognized in his dissent, the provision "explicitly" singled out poor people; no other publicly-assisted housing project designed to benefit any other group had to be approved by voters. See *id.* at 144 (Marshall, J. dissenting). It is specious to suggest that poor people are not an "independently identifiable" group; poor people would be poor even if citizens could more easily have public housing laws enacted. But in *James* this Court treated *Hunter* as a case involving distinctions based on race, a suspect classification, and refused to extend *Hunter* to strike down a state law making distinctions based on income, a non-suspect

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[2] In fact, rather than burdening the right of homosexuals who oppose anti-discrimination laws to participate in the political process, Amendment 2 advances their position by making such laws more difficult to enact.

classification. See 402 U. S. at 140-42.

The Colorado Supreme Court dismissed *James* as "best understood as a case declining to apply suspect class status to the poor, not as a limitation on *Hunter*." *Evans I*, 854 P. 2d at 1282 n. 21. But this attempted distinction just underscores that *Hunter's* result depended not on any fundamental right but rather on the fact that racial classifications are, as the *Hunter* Court noted, "constitutionally suspect." *Hunter*, 393 U. S. at 391. By refusing to extend *Hunter* to a provision discriminating against a non-suspect class, the Court in *James* recognized that the constitutional infirmity in the provision involved in *Hunter* was that the provision discriminated against a suspect class, not that the provision violated any fundamental right.

Likewise, Amendment 2 violates no fundamental right, so the question in this case involves calssification. While homosexuals constitute an identifiable group, that begs the question of what level of scrutiny to apply to laws such as Amendment 2 that make distinctions based on homosexuality. The level of scrutiny depends on whether or not homosexuals constitute a suspect class; as we shall see in the next section, they do not.

II. UNDER TRADITIONAL EQUAL PROTECTION ANALYSIS, COLORADO CONSTITUTIONAL AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Homosexuals, Bisexuals, and Lesbians Do Not Constitute a Suspect Class.

Federal courts of appeals that have considered the question consistently have found that homosexuality is not a suspect classification. See, e.g., *Steffan v. Perry*, 41 F. 3d 677, 684 n. 3 (D.C. Cir. 1994); *High Tech Gays v. Defense Industry Clearance Office*, 895 F.

2d 563, 573-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F. 2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F. 2d 97, 103 (D. C. Cir. 1987); *National Gay Task Force v. Board of Education*, 729 F. 2d 1270, 1273 (10th Cir. 1984). The reasons for this are not difficult to see. Suspect classes[3] generally are accorded special protection because they have been "'relegated to such a position of powerlessness as to command protection from the majoritarian political process.'" *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 313 (1976) (per curiam) (quoting *San Antonio School District v. Rodriquez*, 411 U. S. 1, 28 1973)). For instance, racial minorities, and blacks in particular, have suffered from "severe economic deprivation caused by pervasive discrimination. . . ." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 406 (1994). Blacks were brought to this country as slaves, and even after emancipation had to suffer through the indignity of pervasive and economically and politically stultifying discrimination well into the present century. See generally *id.* at 406-07 and sources cited therein.

Homosexuals, on the other hand, are economically advantaged compared to similarly situated people, which indicates they have not been the victims of the kind of devestating discrimination

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[3] This Court has recognized three classifications as suspect: race, *Hunter*, 393 U. S. at 392; alienage, *Graham v. Richardson*, 403 U. S. 365, 372 (1971); and national origin, *Korematsu v. United States*, 323 U. S. 214, 216 (1944). In *New Orleans v. Dukes*, 427 U. S. 297, 303 (1976), the Court also included religion among suspect classifications. Besides recognizing several suspect classifications, this Court also has recognized two "quasi-suspect" classifications: sex, *Mississippi University for Women v. Hogan*, 458 U. S. 718, 723-24 (1982) and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). Classifications that touch on these categories are subject to a somewhat more stringent review than the normal national basis test. See *Hogan*, 458 U. S. at 724. For the same reasons they do not constitute a suspect class, homosexuals also do not constitute a quasi-suspect class.

as that faced by racial minorities. Average household income for homosexual men and lesbians is generally higher than the national average, and homosexuals are more likely to have college degrees and hold professional or managerial positions than heterosexuals. See *id.* at 408-09. Homosexuals also have political power disproportionate to their numbers. In fact, "'it is clear that homosexuals have crossed a threshold [and have become] an integral part of American political life.'" *Id.* at 410 (quoting Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N. Y. Times, Oct. 11, 1992, §6 (Magazine), at 20); see also *High Tech Gays*, 895 F. 2d at 574 (noting that "homosexuals are not without political power").

More importantly, unlike race, national origin, or sex, homosexuality is not an immutable characteristic. A person cannot choose to be born African-American, Chinese-American, or female. Homosexuality, however, is "fundamentally different," *High Tech Gays*, 985 F. 2d at 563, because what defines the class of homosexuals is conduct. See *id.* at 563-64 ("Homosexuality is not an immutable characteristic; it is behavioral"); *Ben-Shalom*, 881 F. 2d at 464 (an admission of homosexuality "is compelling evidence that plaintiff has in the past and is likely to again engage in [homosexual] conduct"); *Woodward*, 871 U. S. at 1076 ("homosexuality is primarily behavioral in nature").

One might argue that homosexuality is not necessarily defined by behavior because a person can be homosexual in orientation without actually engaging in homosexual behavior. But the courts of appeals have routinely rejected this assertion, recognizing that for practical purposes a person's identification of himself as homosexual is strong–indeed compelling–evidence that the person is engaging in or desires to engage in homosexual conduct. See *Steffan*, 41 F. 3d at 690; *Ben-Shalom*, 881 F. 2d at 464. "To pretend that homosexuality or heterosexuality is unrelated to conduct borders on the absurd. What distinguishes the class of homosexuals from the class of heterosexuals is . . . the nature of the member's sexual

proclivities or interests. . . ." *Watkins v. United States*, 847 F. 2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting.), *vacated*, 875 F. 2d 699 (9th Cir. 1989).[4] Thus, "[e]ven if we define the class as those who have a 'homosexual orientation,' its members will consist principally of active practicing homosexuals. . . ." *Id.* at 1360-61. Even a leading homosexual rights organization has stated that "homosexuality is inexorably intertwined with 'homosexual conduct.'" *Steffan*, 41 F. 3d at 640 n. 11 (quoting Amicus Curiae Brief on Behalf of Respondents of Lambda Legal Defense Fund, Inc. at 23 n. 28, *Bowers v. Hardwick*, 478 U. S. 186 (1986) (No. 85-149)).

That the class of homosexuals is defined by conduct is important. "Discrimination" against people because of the way they act (or desire or intend to act) is not invidious. This is especially so when the conduct at issue generally is regarded not as morally neutral but as morally controversial. Discriminating against a black person is irrational and therefore most likely based on animus for the person, because the fact that a person is black tells us nothing about his character. But given the moral controversy surrounding homosexuality, when a person "makes a distinction based upon a person's sexuality, he is making a judgment about the content of the individual's character." Duncan, *Homosexual Rights Legislation*, 69 Notre Dame L. Rev. at 405. Cf. *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 760 (1993) (because there are "common and respectable reasons for opposing [abortion] other than hatred of or

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[4] Significantly, in *Watkins*, Judge Reinhardt, while demonstrating why homosexuals are not a suspect class, expressed his personal agreement with the view that homosexuals are a suspect class, and sharply criticized this Court's opinion in *Bowers v. Hardwick*, 478 U. S. 186 (1986), which held the Constitution does not protect homosexual sodomy. See *Watkins*, 847 F. 2d at 1356, 1358 (Reinhardt, J. dissenting). Despite his personal view, Judge Reinhardt's dissent implicitly recognized that to hold that homosexuals are a suspect class would require this Court to overrule *Bowers*. See *infra*.

condecension toward. . . women as a class," opposition to abortion is not an "irrational surrogate" for opposition to women). As Dr. Martin Luther King insightfully recognized, racial discrimination is wrong because it involves a judgment based on something other than "the content of [a person's] character." *Id.* at 402 n. 37 (quoting *I Have a Dream*, reprinted in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 219 (James Melvin Washington ed. 1991)). That being so, there is a significant difference between classifications based on race and classifications based on sexual orientation, a difference that should be reflected in the level of constitutional scrutiny given to laws making those classifications.

Moreover, to recognize homosexuals as a suspect class would conflict with this Court's decision in *Bowers v. Hardwick*, 478 U. S. 186 (1986). In *Bowers*, this Court upheld a Georgia law making sodomy a crime, as applied to a homosexual defendant, because the Constitution contains no fundamental right to commit homosexual sodomy and because a rational basis supported the law. *Id.* at 192, 195-96. As several courts of appeals have recognized, it would make no sense to declare homosexuals a suspect class when states may criminalize the conduct that defines the class. See *Ben-Shalom*, 881 F. 2d at 464; *Woodward*, 871 F. 2d at 1076; *Padula*, 822 F. 2d at 103. As the D. C. Circuit noted in *Padula*, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." 822 F. 2d at 103.

For all these reasons, homosexuals do not constitute a suspect class. Therefore, laws making distinctions based on sexual orientation, such as Amendment 2, need only be rationally related to a legitimate government interest to pass constitutional muster. *Heller v. Doe*, 113 S. Ct. at 2642. Amendment 2 easily passes that test.

B. Amendment 2 Is Rationally Related to Several Legitimate State Interests.

In analyzing whether Amendment 2 rationally relates to any legitimate state interest, it is important to keep in mind that anti-discrimination laws do not come without costs. Generally, in a free society a person may associate with whomever he pleases and may dispose of and control access to his property as he pleases. Employers generally are free to hire and fire whomever they please for any reason. Anti-discrimination laws constitute an exception to this general rule. When a state enacts a law prohibiting discrimination against a certain group, it is in effect telling citizens they must associate with members of that group, or that they must make their property available for members of that group. In other words, anti-discrimination laws constitute governmental regulation of personal relationships and property that limit the liberty of people to act as they see best.

In imposing anti-discrimination laws, states must decide whether the benefits derived from protecting a certain group against discrimination outweigh the costs imposed on the associational and property rights of other citizens. Part of that calculus is the need to protect group members. As noted above, homosexuals as a class generally are economically advantaged, well educated, and politically powerful. A state could rationally conclude that the need to protect homosexuals is not great and therefore does not outweigh the burden placed on other citizens' general right to associate and use their property as they see fit.

Likewise, as Justice Erickson recognized in his dissent, a state's resources are not limited, and states have a legitimate interest in spending those resources as effectively as possible. That means a state must necessarily make choices, choices which may not treat all groups equally. In the area of civil rights protection, it is rational for a state to focus its resources on protecting traditional suspect classes that are in greater need of protection than relatively affluent and well-educated classes, such as homosexuals, who have less need of protection. By making it more difficult to enact anti-discrimination laws protecting homosexuals, Amendment 2 serves the goal of preserving civil rights enforcement resources for use for traditionally suspect groups. See *Evans II*, 882 P.2d at 1365-66 (Erickson, J., dissenting).

One might argue that the state could serve these legitimate purposes simply by not passing anti-discrimination laws protecting homosexuals, and that removing the issue from the normal political process is not necessary. But rational basis analysis does not require a state to use the most narrowly tailored means possible to address a legitimate interest. "A classification does not fail rational-basis review because it is not made with mathematical nicety," so long as there is some rational connection between the end and the means. *Heller*, 113 S.Ct. at 2643. Certainly, a state rationally may conclude that making it more difficult to enact anti-discrimination laws protecting homosexuals will protect property and association rights from the intrusive regulation associated with those laws and conserve enforcement resources for use in other areas.

Associational and property rights are not the only liberties that can come in conflict with anti-discrimination laws. Many people have sincere religious or moral beliefs that would prevent them from hiring or doing certain types of business with homosexuals. For example, persons running a religious school may sincerely believe that hiring homosexuals would be wrong because hiring homosexuals would create a harmful influence on students. Or, a landlord might not want to rent to two homosexuals out of a sincere belief that it would be wrong to facilitate homosexual activity. Compare *Attorney General v. Desilets*, 636 N.E. 2d 233 (Mass. 1994) and *Smith v. Fair Employment and Housing Commission*, 30 Cal.Rptr. 2d 395 (Cal. App. 1994),*review granted*, 880 P.2d 111 (Cal. 1994), both of which involved state attempts to force landlords to rent to cohabitating unmarried couples despite the landlords 'sincere belief that renting to those couples would violate the landlords' religious convictions.

Protecting citizens' religious liberty is certainly a legitimate state interest. The United States Constitution itself grants special protection to the free exercise of religion. U.S. Const. Amend. 1, cl. 2. By precluding legislation that would increase the opportunities for conflict between religious belief and legal duty and would "use governmental power to punish and discourage employers and landlords for making decisions based upon sincerely held religious or moral beliefs," Duncan, *Homosexual Rights Legislation*, 69 Notre Dame L. Rev. at 405, Amendment 2 serves to protect Colorado citizens' religious liberty.

CONCLUSION

Amendment 2 does not violate any fundamental right. Homosexuals, the class Amendment 2 singles out, are not a suspect class. Amendment 2 is rationally related to several legitimate state interests. Therefore, this Court should reverse the Colorado Supreme Court's decision in this case and hold that Amendment 2 does not violate the Equal Protection Clause.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF OF AMICI CURIAE STATES OF ALABAMA, CALIFORNIA, IDAHO, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, AND VIRGINIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE SOVEREIGNTY OF THE PEOPLE AND THEIR RIGHT TO ALLOCATE GOVERNMENTAL POWER WITHIN THE STATE AS THEY SEE FIT. 6

II. AMENDMENT 2 DOES NOT IMPAIR ANY FUNDAMENTAL RIGHT WITHIN THE MEANING OF THIS COURT'S EQUAL PROTECTION DECISIONS 11

III. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE RIGHT OF THE PEOPLE TO ENACT CONSTITUTIONAL PROVISIONS TO PROTECT CIVIL LIBERTIES..... 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bolling v. Sharpe, 247 U.S. 497 (1954) 20

City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) 7

Dreyer v. Illinois, 187 U.S. 71 (1902) 9

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994) 5, 19

Evans v. Romer, 854 P.2d 1270 (Colo. 1993), cert. denied, 114 S.Ct. 419 (1993) ..... *passim*

Evans v. Romer, 882 P.2d 1335 (Colo. 1994), cert. granted, 115 S.Ct. 1092 (1995) 4

Gordon v. Lance, 403 U.S. 1 (1971) 15, 16

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 5, 8, 9, 10

James v. Valtierra, 402 U.S. 137 (1971) 5, 13, 14, 15, 16, 24

Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) 4, 17

Lawrence County v. Lead-Deadwood Sch. Dist., No. 40-1, 469 U.S. 256 (1985) 9

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 3, 7

Pacific States Tel. and Tel. Co. v. Oregon, 223 U.S. 118 (1912) 10

Reitman v. Mulkey, 387 U.S. 369 (1967) 13

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Sims, 377 U.S. 533 (1964), reh'g denied, 379 U.S. 870 (1964) 4, 17

Sailors v. Board of Educ. of Kent County, 387 U.S. 105 (1967) 9

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 9

United Mine Workers of Am. Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 10

Washington v. Davis, 426 U.S. 229 (1976) 12

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) 12, 13, 16

Williams v. Rhodes, 393 U.S. 23 (1968) 4, 17

CONSTITUTIONS

U.S. Const. amend. IV 18

U.S. Const. amend. V 18, 20

U.S. Const. amend. VI 18

U.S. Const. amend. VIII 19

U.S. Const. amend. XIV, § 1 ..... 1, 3, 4, 9, 13, 28

Ariz. Const. art. 2, § 12 23

Ark. Const. amend. 68, § 1 23

Ca. Const. art. 9, § 8 23

Ca. Const. art. 12, § 6 23

Colo. Const art. 5, § 50 23

TABLE OF AUTHORITIES – Continued

Page

Colo. Const. art. 2, § 1 6

Ga. Const. art. 4, § 1 23

Minn. Const. art. 1, § 16 23

Ok. Const. art. 9, § 18 23

Wash. Const. art. 9, § 4 23

Wis. Const. art. 1, § 18 23

RULES AND STATUTES

Maryland Regulation § 09.12.23 21

Mo. Ann. Stat. § 105.711 (Vernon 1995 Supp.) 23

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OTHER AUTHORITIES

The Federalist No. 39 (J. Madison) 7

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Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988) 11

No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF OF AMICI CURIAE STATES OF ALABAMA, CALIFORNIA, IDAHO, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, AND VIRGINIA IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

Amici curiae – states of Alabama, Idaho, California, Nebraska, South Carolina, South Dakota, and Virginia – hold a common view that the ruling and rationale below pose a serious threat to state constitutional provisions

and, more generally, to legislation enacted at any level other than local government. As detailed below, the Colorado Supreme Court has announced a fundamental constitutional right of equal group participation in the political process that, if allowed to stand, necessarily disqualifies state constitutions as repositories of important public policies. Indeed, the logical force of the court's rationale even casts doubt upon the power of state legislatures to enact laws that remove issues favored by "identifiable groups" from local political processes. Further, the novel theory underlying the ruling conflicts with established principles of equal protection, thus undermining the stability necessary for states to conduct their public affairs with reasonable confidence.

Amici curiae states join in this brief to focus attention on flaws in the analysis below and to illuminate their negative consequences for state governments. The effect of the decision below is to declare off limits to state governments an undefined body of policy choices. The prohibition is undefined because the court did not explain the term "independently identifiable groups," nor did it clarify how disagreeable state action must be to such groups before their rights of political participation are violated. Nor is it clear to what degree the new principle is prospective, or whether it might cause the undoing of numerous state policies thought to be well-settled. Whatever the scope of identifiable groups, and their protected political interests, issues falling within the uncertain contours must be left to local political processes.

This novel formulation of an asserted fundamental right does substantial violence to constitutional principles: It deprives states of their constitutional power to structure their political functions and allocate government power as they see fit; it distorts established doctrines of equal protection by imposing a hybrid right labeled "fundamental," but apparently available only to certain identifiable groups; and it conflicts with the right of the people to set public policies by enacting constitutional amendments to limit government actions.

SUMMARY OF THE ARGUMENT

This is a case in which the court below decided that the Constitution's protection of participatory democracy somehow required the results of a voter initiative to be set aside. In order to reach this remarkable result, the court was required not only to stretch beyond recognition an important line of equal protection cases decided by this Court, but also to renounce the foundational principle that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

The decision below effectively prohibits states from addressing many substantive issues at the state level. It thus creates a right to have political issues decided – finally – at the local, rather than higher levels. This result conflicts with the general power of states to structure their political functions as they see fit, subject only to exceptions based on federally protected interests.

This case does not involve suspect classifications. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969). Nor is it about the right to cast a vote for the candidate of one's choice. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). Nor is it about the dilution of one's vote through the process of assigning voters to malapportioned districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Respondents seek not the vote, but rather the right to enact laws which regulate the lives and property of others free of state constitutional limitations designed to protect the liberties of those whom they seek to restrict. In other words, Respondents claim (and the court below has recognized) the right, as an "independently identifiable" interest group, to have local regulatory measures insulated by the Equal Protection Clause from revision or repeal at the state level, whether by the state legislature or by the people themselves through the initiative process.

According to the court below, Amendment 2 violates equal protection because it removes one issue important to an identifiable (but non-suspect) group from the ordinary political process by deciding the issue – homosexual and bisexual rights – as a matter of state constitutional law. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) ("*Evans I*"), Pet. App. D-25-26.[1] The Colorado court held that strict scrutiny is triggered under the Equal Protection Clause

[1] *Evans I* affirmed the trial court's issuance of a preliminary injunction against enforcement of Amendment 2. Subsequently, the Colorado Supreme Court reaffirmed the constitutional principles it had articulated in *Evans I* and entered final judgment permanently enjoining enforcement of Amendment 2. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) ("*Evans II*") (Pet. App. B).

not because Amendment 2 employs a suspect classification, but because it "singles out and prohibits this [non-suspect] class of persons from seeking governmental action favorable to it and, thus, from participating equally in the political process." *Id.* at D-26.

Not only is the court's holding not supported by *Hunter*, or any of this Court's other precedents, it directly conflicts with the holding and reasoning of *James v. Valtierra*, 402 U.S. 137 (1971), which explicitly rejected a claim identical in all material respects to that upheld in this case. *Hunter* and its progeny are not about an Equal Protection Clause at war with popular democracy and state constitutional freedoms. Instead, this important line of cases is inextricably intertwined with the central meaning of equal protection – the protection of racial minorities against laws which place unique burdens upon their ability to enact legislation prohibiting racial discrimination. *Hunter*, 393 U.S. at 391.

The decision of the court below seriously threatens the right of all of the people to participate collectively and directly in the political process. It also threatens many civil liberties protected by state and federal law. This decision has already been followed by one federal district court to set aside a similar ballot initiative passed by voters in Cincinnati, Ohio. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994). The decision also casts a long shadow over numerous provisions of state constitutions and statutes

that remove issues favored by other "identifiable groups" from the local political process.

ARGUMENT

I. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE SOVEREIGNTY OF THE PEOPLE AND THEIR RIGHT TO ALLOCATE GOVERNMENTAL POWER WITHIN THE STATE AS THEY SEE FIT.

Although the court below acknowledged that the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people," and that the people "have the sole and exclusive right of governing themselves . . . and to alter and abolish their constitution," *Evans I* (Pet. App. D-2, *quoting* Colo. Const. art. 2, §§ 1 and 2), its decision in this case is based on a new and radical principle totally at odds with the sovereignty of the people. The "infringement" of the right of political participation which requires, according to the court, that Amendment 2 be set aside is nothing more than the necessary and normal result of a political disagreement between the sovereign people of Colorado and their elected representatives – their employees – in state and local government. The people have amended their constitution to forbid their employees from making homosexuality and bisexuality protected categories under anti-discrimination laws. The court below has determined that since this issue is important to certain identifiable

interest groups, it may not be decided by the people through an initiative amending the state constitution.

This is a revolutionary repudiation of the basic principle of self-government on which our democratic institutions are based. As this Court said almost two centuries ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." *See also*, The Federalist No. 39 (J. Madison). In furtherance of this political truth, this Court has recognized that citizen initiatives, such as Amendment 2, are an essential means of assuring popular sovereignty. For example, in *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976), this Court stated that "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." This Court also recognized that "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672. The Colorado Supreme Court's unprecedented decision is a significant threat to the right of direct self-government through citizen initiatives. It also threatens to invalidate many basic rights currently existing under state constitutions.

Nor can the Colorado Supreme Court's decision be squared with the Constitutional principle of federalism. According to the court below, "any *legislation* or state constitutional amendment which infringes" the right of political participation must be subjected to strict scrutiny. *Evans I* (Pet. App. D-21) (emphasis added). In effect, the

court held that all issues deemed important by identifiable groups must be decided by local elected representatives, not by state legislatures, direct democracy, or constitutional amendment.

This Court has recognized, however, that local governments are instrumentalities of the state, and that the state can, with limited exceptions, grant and withdraw powers to such governments at its pleasure. The general rule concerning the power of states to structure internal political functions and to allocate government power was articulated well in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 165 (1907). There this Court wrote:

> municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. The number, nature, and duration of the powers conferred upon these corporations, and the territory over which they shall be exercised rests in the *absolute discretion of the state*. . . . The state, therefore, at its pleasure may modify or withdraw such powers, may take without compensation such property, hold itself or vest it in other agencies, expand or contract the territorial area, unite the whole or another part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, *with or without the consent of the citizens or even against their protest*.

Id. at 178-79 (emphasis added). *Hunter v. City of Pittsburgh* remains good law. States generally have absolute power relative to local governments. As a consequence, identifiable groups have no constitutional claim to final and

binding decisionmaking at the local level of government, and local governments have no inherent constitutional standing to challenge state action.[2]

While *Hunter v. City of Pittsburgh* addressed state authority to distribute power vertically, *i.e.*, between state and local governments, states also retain authority to allocate power horizontally, *i.e.*, among the branches of government, and the people, as they see fit. A state's allocation of power among branches of government, standing alone, is not subject to federal constitutional restraint. "Whether the legislative, executive and judicial powers of a State shall be kept distinct and separate, or whether persons or collections of persons belonging to one department may, in some respects, exert powers which, strictly speaking, pertain to another department, is for the determination of the State." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) ("It would make the deepest of inroads upon our federal system for this court to hold that it can determine the appropriate distribution of powers and their delegation within the . . . states.") *Sailors v. Board of Educ. of Kent County*, 387 U.S. 105, 109 (1967) ("Save and unless the state, county or municipal government runs afoul of a

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[2] Local governments may sue the state for withdrawing power from the local political process only when some intervening federal action vests power with the subdivision rather than the state. *Cf. Lawrence County v. Lead-Deadwood Sch. Dist.*, No. 40-1, 469 U.S. 256 (1985) (payments under federal statute to units of local government "for any governmental purpose" precludes states from controlling how local units spend money).

federally protected right, it has vast leeway in the management of its internal affairs.").

State discretion in structuring decisionmaking authority also includes the choice of the people to reserve certain powers to themselves. *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (claim that initiative and referendum process violated guarantee clause held nonjusticiable). Just as *Hunter v. Pittsburgh* recognized state control over vertical distributions of power, these cases expand the principle to horizontal allocations. There is no constitutional directive that states delegate any particular power or issue to any branch of government. Correspondingly, there is no right of identifiable groups to demand that any particular branch be empowered to act on a given matter. While the right to petition *is* fundamental, *United Mine Workers of Am., Dist. 12 v. Illinois Bar Ass'n.*, 389 U.S. 217, 222 (1967), it defies law and reason to claim the right requires that every government office retain the inviolate authority to grant every petition.

To be sure, state action, concerning both substantive law as well as political process and structure, is subject to constitutional limits. States may not structure their functions in a way that damages federally protected rights or interests. *Hunter v. Erickson* 393 U.S. 385 (1969). To state that proposition, however, is to place claimed constitutional rights into a federalist context. Rights do not exist in a vacuum, and cannot be recognized without consequence to other constitutional values.

In short, the Equal Protection Clause simply does not elevate local government over all competing governmental authorities, including the people themselves.

II. AMENDMENT 2 DOES NOT IMPAIR ANY FUNDAMENTAL RIGHT WITHIN THE MEANING OF THIS COURT'S EQUAL PROTECTION DECISIONS

The trial court rejected Respondents' claim that homosexuals and bisexuals constitute a suspect or quasi-suspect class. Pet. App. C-18-19. Respondents did not appeal that holding, and the court below did not base its decision on a suspect or quasi-suspect class rationale. *Evans I* (Pet. App. D-7-8). Thus, in order to trigger strict scrutiny of Amendment 2, it was necessary for Respondents to establish that the amendment creates "inequalities bearing on fundamental rights." *See* Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988).

The court below stated that the "most explicit, and nuanced, articulation" of the fundamental right at issue was contained in a series of decisions, beginning with *Hunter*, in which this Court reviewed "legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." *Evans I* (Pet. App. D-14). The cases relied upon by the court, however, do not support the court's holding.

In *Hunter*, this Court considered whether an amendment to the Akron, Ohio city charter violated the Equal Protection Clause. The amendment prohibited the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters in a regular or general election. The racially discriminatory impact of

this provision was crucial to the Court's rationale. In striking down the challenged charter amendment, this Court did not craft an amorphous new right of political participation for any and every identifiable group; rather, the Court invalidated the law because it constituted a "meaningful and unjustified official distinction[] based on race." *Hunter*, 393 U.S. at 391.[3] In other words, the central point in *Hunter* was that the charter amendment placed "special burdens on *racial minorities*" concerning their ability to enact legislation prohibiting racial discrimination in housing. *Id.* (emphasis added).

Similarly, in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), this Court invalidated a voter initiative which stipulated that no local school board could require any student to attend a school other than the one located nearest or next nearest to the child's residence. The initiative was facially neutral regarding race, but included a large number of exceptions to the rule, which led this Court to conclude it was enacted "because of," not merely "in spite of," its adverse effects upon busing for racial integration. *Id.* at 471. The Court carefully

[3] *Hunter* was decided several years before this Court determined, in *Washington v. Davis*, 426 U.S. 229, 239 (1976), that a facially-neutral classification is not suspect absent proof of "a racially discriminatory purpose." Professor Cass Sunstein has commented that "the difficulty now of understanding the Court's opinion [in *Hunter*] stems largely from that subsequent development." Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 147. Perhaps this explains the misreading of *Hunter* by the court below.

discussed the meaning of *Hunter* and explained why legislation of the kind challenged in that case "falls into an inherently suspect category":

> [W]hen the political process or the decisionmaking mechanism used to address *racially* conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' "

Id. at 485-86 (quoting *James v. Valtierra*, 402 U.S. at 141, and *Hunter v. Erickson*, 393 U.S. at 391) (emphasis added).

Hunter and *Seattle School District* are not fundamental rights cases. They are suspect class cases which hold that "when government acts to single out a *racial* problem for special treatment, and when the special treatment operates to the peculiar disadvantage of *racial minorities*, there is reason for more than usual suspicion of the legislative judgment." Sunstein, *supra*, 1982 Sup. Ct. Rev. at 165 (emphasis added). In other words, these cases hold that a classification is race-specific "if it singles out a racial problem for special and disadvantageous treatment." *Id.* at 149. There is no reasonable way to read *Hunter* and *Seattle School District* as supporting the far-reaching fundamental right applied by the court in this case. Both cases involved this Court's efforts to implement the principle lying at the core of equal protection — the prevention of invidious discrimination on the basis of race.[4]

[4] This also explains this Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967). In *Reitman*, the Court invalidated an initiated measure that guaranteed private citizens absolute discretion to discriminate in the sale or rental of residential real

As Justice Erickson's thoughtful dissent in *Evans I* makes clear, the Colorado Supreme Court's reading of *Hunter* as the source of a broad right of political participation for "identifiable groups" was explicitly discussed and rejected by this Court in *James*. *See Evans I* (Pet. App. D-49-52) (Erickson, J., dissenting). *James* upheld the constitutionality of a California constitutional amendment which provided that no "low rent housing project" could be undertaken by "any state public body" until the project was approved by a majority of the voters at a community election. *James*, 402 U.S. at 139 n.2. Thus, as in the case of Colorado Amendment 2, the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. Appellees in *James*, a number of low-income residents of California, argued that the California amendment constituted "unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." 402 U.S. at 142. The Court clearly rejected this attack on California's "procedure for democratic decisionmaking." *Id.* at 143. Justice Black's majority opinion in *James* explained the Court's reasoning in terms that reject authoritatively the reasoning of the court below in this case:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always

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property. This Court held that the law violated the Equal Protection Clause because it "was intended to authorize, and does authorize, *racial discrimination* in the housing market." *Id.* at 381 (emphasis added).

> deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

Id. at 142. Since the Court in *James* read *Hunter* as a case involving political burdens on racial minorities (*id.* at 140-41), and since the poor are not a suspect class under the Equal Protection Clause, the Court held that the California amendment could be invalidated "only by extending *Hunter*, and this we decline to do." *Id.* at 141.

Likewise, the attempt by the court below to read *Gordon v. Lance*, 403 U.S. 1 (1971), as support for an extremely far-reaching right of political participation is misguided. *See Evans I* (Pet. App. D-19-20). In *Gordon*, this Court upheld a West Virginia law that proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The Court held that, unlike the facts of *Hunter*, the West Virginia law did not single out any "discrete and insular minority" for special burdens. 403 U.S. at 5. Therefore, there was no equal protection violation. *Id.* at 7.

Noting that the West Virginia laws upheld in *Gordon* "had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss Hunter," the court below concluded that *Hunter* "applies to a broad spectrum of discriminatory legislation." *Evans I* (Pet. App. D-19-20). The court attempted to bolster this specious reasoning by adding the following trivial insight: "If . . . *Hunter* is a 'race' case and nothing

more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*." *Id.* But, of course, this Court in *Gordon* did precisely what *Evans I* said it did not do — it discussed *Hunter* only to distinguish it as a case involving legislation that singled out racial minorities and other suspect classes for unfavorable treatment. *Gordon*, 403 U.S. at 5. Although the West Virginia laws made it more difficult for some political groups to enact their legislative agendas, these laws did not discriminate against any racial or other suspect class and, therefore, did not violate the Equal Protection Clause. *Id.* at 5-7. Thus, *Gordon* is an application – not a repudiation – of the "race only" reading of *Hunter*.

Taken one by one or together, *Hunter*, *Seattle School District*, *James*, and *Gordon* do not support a broad right for any and every identifiable group to have its political agenda, as enacted by local governments, insulated against superseding state law. Rather, these cases recognize that the central purpose of the Equal Protection Clause is to protect racial and other suspect classes against discriminatory state action. Therefore, laws that single out racial problems for special and disadvantageous treatment are subject to strict scrutiny even if the laws are facially neutral. Laws that make it more difficult for non-suspect groups to enact their political agendas, such as the laws upheld in *James* and *Gordon*, do not conflict with equal protection. Since Amendment 2 falls into the latter category, the court below erred by subjecting the amendment to strict scrutiny.

The Colorado Supreme Court also found support for the fundamental right of political participation in this Court's cases dealing with the right to an equally

weighted vote in the electoral process. The court discovered what it referred to as a "common thread" between this case and three groups of this Court's voting rights cases – the right to vote cases, the reapportionment cases, and the ballot access cases. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Williams v. Rhodes*, 393 U.S. 23 (1968). In each of these cases, however, the basis for this Court's decision was the fact that the challenged laws impinged directly on the established and fundamental right to vote for the candidates of one's choice. None of these cases even remotely invokes the principle which controlled the decision below – a vague right of political participation that extends beyond the voting booth to invalidate state constitutional limitations on substantive legislative agendas. To be sure, these voting rights cases do demonstrate that this Court recognizes the importance of equality in assuring citizens an equally-weighted vote for the candidates of their choice. The court below ignored this context and improperly read these cases as supporting a seemingly unlimited right to have a political agenda, as expressed in local regulation, insulated against the countervailing interests of others, as expressed in the statewide initiative process.

In this case, there is no state-created obstacle to voting or any other aspect of the electoral process. The voting rights cases are not applicable to Amendment 2, and the court below erred by relying upon them.

III. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE RIGHT OF THE PEOPLE TO ENACT CONSTITUTIONAL PROVISIONS TO PROTECT CIVIL LIBERTIES

The potential scope of the right recognized by the court below is breathtaking. If the court means what it says, it has discovered a constitutional right of any "independently identifiable class of persons" to have its political agenda insulated against normal democratic processes.

The idea animating this remarkable new right appears to be the truism that constitutional law discourages political participation by groups who favor unconstitutional legislation. Thus, homosexuals and bisexuals were discouraged by Amendment 2 because it made their desire to enact regulations on the lives, businesses, and property of others – through enactment of "gay rights" legislation – more difficult to accomplish. Similarly, the Establishment Clause of the First Amendment discourages political participation of some religious groups because it prohibits the enactment of many of their political preferences, such as state financing of parochial schools. Pro-life groups, members of which often share an "independently identifiable" religious and cultural heritage, are discouraged by the unenumerated right of privacy, by state equal rights amendments, and by other provisions of state constitutions protecting reproductive rights, because these provisions prohibit their strong preferences for laws restricting access to abortion services. Organized groups of crime victims are discouraged from political participation by the Fourth, Fifth, Sixth,

and Eighth Amendments, and by their counterparts in state constitutions, because these civil liberties invalidate laws that violate the rights of defendants in criminal cases.

The list is endless. Constitutional law routinely discourages groups from seeking to legislate political agendas which the Constitution has taken out of the hands of legislators. Indeed, the central purpose of the Bill of Rights and similar protections in state constitutions is to shelter persons whose liberties are protected against political agendas designed to restrict those rights.

The right of political participation created by the court below casts a long shadow over the right of the people to protect their freedom by adopting constitutional liberties. Although the court below did not define the concept of an "independently identifiable group," it did conclude that it was broad enough to cover non-suspect classes such as homosexuals and bisexuals. *Evans I* (Pet. App. D-25-26). Moreover, while denying that it was opening the floodgates for other groups wishing to employ the right of political participation, the court supplied no limiting principle to contain this new right. *Id.* at D-23-27.

In *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), a federal district court followed *Evans I* and permanently enjoined a ballot initiative passed overwhelmingly by the voters of Cincinnati. The court attempted to limit the scope of the right of political participation by distinguishing between "independently identifiable groups" and mere "identifiable groups." 860 F. Supp. at 434 n.12. The court said that

"the difference between an 'independently identifiable group' and an 'identifiable group' is that where the factor identifying the group transcends the mere support for any given issue, the group is 'independently identifiable.' " *Id.* "On the other hand, a group whose sole identifying characteristic is the group's support for a single issue is merely an identifiable group." *Id.* Under this definition, most identifiable groups – such as the ones discussed in the examples above – are also independently identifiable groups.[5]

Indeed, any generally applicable definition of independently identifiable group that is broad enough to include homosexuals and bisexuals almost certainly will include many other groups whose policy preferences have been placed beyond the ordinary political process by the state constitutional rights of individuals.[6] Nor is

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[5] For example, many groups which support state financing for parochial schools share a common religious tradition, dating back several thousand years, which transcends any particular issue. Similarly, many (perhaps most) pro-life groups are composed of individuals who share religious and cultural characteristics which transcend the politics of abortion.

[6] Logically, the right of political participation would extend to apply against the federal government by virtue of the equal protection component of the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Thus, identifiable groups could argue that many provisions in federal legislation restrict their political participation by removing their preferred issues from the political process. This application of the newly-minted equal protection principle would stand the Supremacy Clause on its head.

the principle limited to constitutional provisions. According to the court below, "any *legislation* or state constitutional amendment which infringes" the right of political participation must be subjected to strict scrutiny. *Evans I* (Pet. App. D-21) (emphasis added). Although it is not clear from the opinion that the court understood the significance of this very broad statement, it appears to mean that all issues affecting identifiable interest groups must be decided by elected representatives at the level of local government. Assume, for example, the Colorado legislature had enacted statewide legislation containing the same substantive policy choice as that contained in Amendment 2. Under the decision below, the legislation is unconstitutional because it has removed the issue of homosexual rights from the normal political process of local government. This principle threatens most substantive legislation.

For example, regulation of smoking obviously affects an "independently identifiable" group. *Evans I* calls into doubt tough statewide measures such as Maryland's Regulation § 09.12.23 (barring smoking in most workplaces), promulgated under that state's Occupational Safety and Health Act, Md. Code Ann., Health Gen. § 24-501, *et seq* (1990). As a result of the regulation, smokers are unable to seek more favorable treatment from local jurisdictions. Further, if smokers secured passage of a statewide measure opening the workplace to smoking, and preempting more restrictive local standards, then *nonsmokers* would have an *Evans I* claim that they had been fenced out of the process.

As the Maryland example illustrates, *Evans I* not only encourages the factionalizing of the community into

aggrieved groups, it also generates groups with mirror opposite claims, which, if the doctrine is applied consistently, will be locked in judicial stalemate. Such is the case in Oregon, where the state legislature recently enacted a measure that is the polar opposite of Amendment 2. Oregon's new law prohibits local governments from enacting measures that block protected status based on homosexuality. *See* O.R.S. 659.165 (1993). To the extent that identifiable cultural, religious, or political groups favor enacting such local measures, they have been locked out of the process, and have a claim under *Evans I*. Thus, presumably neither the proponents nor the opponents of statewide measures extending anti-discrimination protection to homosexuals would be permitted, under the Colorado Supreme Court's reasoning, to "enact legislation in their interest."

The list of state constitutional or legislative provisions that might be challenged as interfering with the political participation of identifiable groups is long. Noted below are just a sampling of state measures that would appear vulnerable.

State civil service and personnel systems. Most states have some form of civil service and personnel system governing conditions of state employment. It is common for such schemes to prohibit the state from contracting out work that will result in the displacement of classified employees. However, private contractors, reform groups, taxpayer advocate groups, and others may desire greater use of contracting to accomplish state objectives. Although such a policy clearly would be "in their interest," they cannot pursue it without mounting a constitutional campaign. *See, e.g.*, Ca. Const. art. 7 § 1; Co. Const.

Art. 9, § 1; N.Y. Const. art. 5, § 6. And if the campaign succeeds, a class of independently identifiable state employees could challenge the action.

Prohibitions on public expenditures to benefit any religious school. Such provisions are common among the states. *See, e.g.*, Ariz. Const. art. 2, § 12; Ca. Const. art. 9, § 8; Minn. Const. art. 1, § 16; Wash. Const. art. 9, § 4; Wis. Const. art. 1, § 18; and others. As a result of such provisions, supporters of private religious schools may not petition local school districts, the state legislature, or any other democratic body for financial or material aid, even if such aid would be fully consistent with the First Amendment. Their only remedy is to seek a constitutional amendment.

State public utility schemes. All states have some form of utility regulation. Such schemes not only regulate the rates and practices of utilities, but grant monopoly status to such utilities. In an era of deregulation, increasing competition, and technological advance, ratepayers, consumer groups, or competing providers are making proposals to open controlled markets to competition. In many cases a constitutional amendment would be necessary to authorize such reform. *See, e.g.*, Ca. Const. art. 12, § 6; Ga. Const. art. 4, § 1, P 1; Ok. Const. art. 9, § 18.

Bars on public funding for abortions. Several states bar public funding of abortions, either by constitutional provision, *see, e.g.*, Ark. Const. amend. 68, § 1; Colo. Const art. 5, § 50; or by statute. *See, e.g.*, Wis. Stat. Ann. § 59.07 (West 1988 & 1994 Supp.) (prohibiting local governments from funding abortions); Mo. Ann. Stat. § 105.711 (Vernon 1995 Supp.). Several identifiable groups, such as women,

the poor, or poor women, might feel it in their interest to petition for a different policy. But they cannot, unless they mount a statewide effort.

The list could continue indefinitely, but the matters already addressed demonstrate the destabilizing nature of the "right" identified in *Evans I*. The Colorado Supreme Court's decision below should be reversed.

CONCLUSION

The court below has misinterpreted several of this Court's equal protection decisions to create an unprecedented and revolutionary fundamental right of any and every "independently identifiable" interest group to overturn statewide constitutional and/or statutory provisions that prevent them from enacting their regulatory agendas at the local level of government. This new equal protection doctrine has cast a long shadow of uncertainty not only over the traditional right of democratic self-government, but also over the concept of constitutionalism – of representative government tempered by individual liberty. Clearly, the Equal Protection Clause does not provide protection for any and every special interest group against the political discouragement that necessarily arises when a political issue favored by the group is removed from the local political process by a constitutional amendment. As Justice Black stated in *James*, "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James*, 402 U.S. at 141. "This procedure for democratic

decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.' " *Id.* at 143. The only interference with political participation in this case was the attempt by Respondents to set aside the results of an election they lost. The people of Colorado chose to enact Amendment 2. Their decision may have been wise or unwise. Regardless, nothing in the Constitution requires this substantive choice by the people to be nullified by judicial decree.

For all of the foregoing reasons, *amici* urge the Court to reverse the decision below and restore to the people of Colorado the results of their democratic decisionmaking.

Respectfully submitted,

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No. 94-1039

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES
in support of the *Petitioners*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Introduction 5

II. Amendment 2 Does Not Infringe Upon Any Fundamental Right 9

A. The Right Of The People To Amend Their State Constitution Is Guaranteed By Article IV, Section 4 Of The United States Constitution 9

B. Amendment 2 Does Not Conflict With Any Particular Provision Of The United States Constitution 11

C. The Equal Protection Clause Requires Only Uniform Treatment Of Similarly Situated Voters 12

III. Amendment 2 Does Not Unconstitutionally Discriminate Against Any Individual Or Group 14

A. Disparate Impact Alone Is Insufficient To Establish An Equal Protection Violation 14

B. There Is No Proof Here Of Purposeful Discrimination Against A Racial Or Other Constitutionally Suspect Class 16

TABLE OF CONTENTS (CON'T.)

IV. The Equal Protection Clause Does Not Guarantee Any Fundamental Right To Participate Equally In The Political Process 18

A. The Constitutionally Guaranteed Right To Vote Does Not Include A Right To Participate Equally In The Political Process 18

B. Any Right To Participate In The Ordinary Political Process Must Be Limited By The Right Of The People To Limit The Power Of Their Representatives By Constitutional Law 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Baker v. Carr, 369 U.S. 186 (1962) 18

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990) 4

Bowers v. Hardwick, 478 U.S. 186 (1986) 4

City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980) 4, 5, 15, 16, 19

Crawford v. Bd. of Educ. of the City of Los Angeles, 458 U.S. 527 (1982) 5, 17, 18

Davis v. Bandemer, 478 U.S. 109 (1986) 5, 15

Dunn v. Blumstein, 405 U.S. 330 (1972) 19

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct. 1993) 3, 24, 25

Evans v. Romer, 63 Empl. Prac. Dec. (CCH) ¶ 42,719 (Colo. Dist. Ct. 1993) 3

Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) 3, 4, 7, 8, 11, 14-20

Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 130 L.Ed.2d 1061 (1995) 3

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 18, 19

Gordon v. Lance, 403 U.S. 1 (1971) 16

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 19

CASES	PAGE(S)
High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990)	4
Hunter v. Erickson, 393 U.S. 385 (1969)	5, 16
James v. Valtierra, 402 U.S. 137 (1971)	5, 16
Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969)	4, 13, 19
Lemon v. Kurtzman, 403 U.S. 602 (1971)	22
Lucas v. Forty-Fourth General Assembly of Colo., 377 U.S. 713 (1964)	19
Luther v. Borden, 48 U.S. (7 How.) 1 (1849)	18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	5, 6
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	22
Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875)	18
Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)	4
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)	22
Reitman v. Mulkey, 387 U.S. 369 (1967)	16
Reynolds v. Sims, 377 U.S. 533 (1964)	4, 13, 14
Rogers v. Lodge, 458 U.S. 613 (1982)	16
San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)	4, 8, 12

CASES	PAGE(S)
School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985)	21
State of Oregon v. City of Rajneeshpuram, 598 F.Supp. 1208 (D. Or. 1984)	22
Washington v. Davis, 426 U.S. 229 (1976)	15
Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)	5, 16
Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)	4

DECLARATIONS & CONSTITUTIONS — PAGE(S)

THE DECLARATION OF INDEPENDENCE (U.S. 1776) 6

U.S. CONST. PREAMBLE 6

U.S. CONST. art. IV, § 4 9

U.S. CONST. art. V 11

Colorado Enabling Act, 1A COLO. REV. STAT. (1980) 6, 7

COLO. CONST. art. II, § 1 7

COLO. CONST. art. II, § 2 3

COLO. CONST. art. II, § 10 23

COLO. CONST. art. II, § 30b (Amendment 2) 2

COLO. CONST. art. IX, § 7 ..... 13, 21

COLO. CONST. art. XVI, § 2 ..... 12, 20

COLO. CONST. art. XVIII, § 1 ..... 13, 20

COLO. CONST. art. XVIII, § 2 ..... 12, 21

COLO. CONST. art. XVIII, § 9 21

OTHER AUTHORITIES — PAGE(S)

COOLEY, CONSTITUTIONAL LIMITATIONS (Spec. ed. 1987) 10-12

HAND, THE BILL OF RIGHTS (1960) 24

PHILIP S. FONER,
THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE (1974) 9

Note, *Developments in the Law: Elections*,
88 HARV. L. REV. 1111 (1975) 8

THE FEDERALIST No. 39 (James Madison)
(Clinton Rossiter ed., 1961) 9

INTEREST OF AMICUS CURIAE

Colorado for Family Values (CFV) is the grassroots organization which initiated and campaigned for the passage of Colorado's Amendment 2. The opponents of Amendment 2 out-spent CFV almost 2 to 1 requiring CFV to rely heavily on citizen volunteers. During the campaign, the Denver television market, which covers approximately 75 percent of the voters in Colorado, refused to run CFV's advertisements. Despite that obstacle, CFV gathered approximately 85,000 signatures to place Amendment 2 on the ballot and hand-delivered over 700,000 information sheets about the amendment. When the voters of Colorado passed Amendment 2, the political pundits were astounded.

Given the role CFV played in the adoption of Amendment 2, CFV is naturally concerned about its continued vitality. CFV believes that states have the power to pass a wide variety of laws to protect the family and community morality, and CFV desires to protect the integrity of our constitutional system of government by ensuring that the original right of the people to limit their government is preserved.

The National Legal Foundation, CFV's counsel, assisted in drafting the language of Amendment 2 and participated as *amicus curiae* in this litigation at the state court level. The Foundation has also participated as *amicus curiae* in several federal and state cases and served as lead counsel in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for CFV is Robert K. Skolrood, the Foundation's Executive Director and General Counsel. Mr. Skolrood is licensed to practice in Illinois, Oklahoma, Virginia, and the District of Columbia, and is admitted to practice before the U.S. Supreme Court and numerous U.S. Circuit Courts of Appeal and District Courts.

STATEMENT OF THE CASE

This case comes to this Court on writ of certiorari. The relevant facts are uncomplicated.

In early 1991, a group of concerned citizens in Colorado Springs, Colorado formed Colorado for Family Values (CFV) to combat the passage of a local ordinance conferring minority status upon homosexuals. Because of CFV's grassroots campaign, the City Council rejected the ordinance.

Following this victory, CFV turned its attention to a movement in the State of Colorado to legitimize homosexuality through pro-homosexual municipal ordinances. Concerned with the effect that government legitimization of homosexuality would have on the traditional family and community morality, CFV began a campaign to put on the ballot an initiative which would prevent the state, its agencies, or political subdivisions from granting special protection to homosexuals.

On August 27, 1991, CFV submitted to the Secretary of State an initiative amendment to the Constitution of the State of Colorado. Later designated Amendment 2, the proposed initiative, if enacted by a vote of the people, would prohibit state and local governments from enacting, adopting, or enforcing "any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." COLO. CONST. art. II, § 30b (Amendment 2).

In May 1992, CFV presented to the Colorado Secretary of State petitions from the required number of qualified voters to present Amendment 2 to the electorate. The secretary placed the initiative on the ballot.

Despite refusals to air CFV political advertisements which placed the

initiative at a disadvantage, on November 3, 1992, pursuant to Article II, § 2 of the State Constitution, the People of Colorado adopted Amendment 2 by a vote of 813,966 to 710,151 (53.4% to 46.6%).

On November 12, 1992, the Respondents sought an injunction in Denver District Court to prevent the enforcement of Amendment 2. The District Court granted a preliminary injunction. *Evans v. Romer*, 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct. 1993). On appeal, the Colorado Supreme Court affirmed, concluding that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution unless it could be proved that Amendment 2 was a necessary means to achieve a compelling state interest. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*). On remand, the trial court ruled that Amendment 2 did not meet the standard of strict scrutiny. *Evans v. Romer*, 63 Empl. Prac. Dec. (CCH) ¶ 42,719 (Colo. Dist. Ct. 1993). On appeal, the Colorado Supreme Court again affirmed. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 130 L.Ed.2d 1061 (1995) (*Evans II*).

To reach this result, the Colorado Supreme Court created a new substantive right out of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It described this new right as the "fundamental right to participate equally in the political process," and then held that Amendment 2 violated this right by fencing Respondents out of the ordinary political processes. *Evans I*, 854 P.2d at 1282-85. In other words, the Colorado Supreme Court ruled that the Equal Protection Clause guaranteed Respondents the right to take the homosexual rights political agenda before the people's elected representatives and that the people of Colorado could not by constitutional law limit Respondents in their effort to win support for that agenda.

SUMMARY OF ARGUMENT

The Respondents made no claim below that "gay men, lesbians, and bisexuals" constitute a suspect class protected from discrimination by the Fourteenth Amendment's Equal Protection Clause. *Evans I*, 854 P.2d at 1275. Nor could they have in light of this Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986).[1]

Instead, Respondents claimed that the Equal Protection Clause guaranteed to them the right to take their homosexual rights agenda to the people's representatives unencumbered by constitutional limitation. The Colorado Supreme Court stated:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

Evans I, 854 P.2d at 1282.

This ruling is both unprecedented and astounding.

As for precedent, the Colorado Supreme Court disregarded this Court's instructions not to create substantive "fundamental rights" out of the Equal Protection Clause. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Further, the Colorado court disregarded the limits that this Court has placed upon the fundamental right to vote. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980) (plurality); *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality). Finally, the Colorado court disregarded this Court's consistent rulings requiring proof of racial discrimination when specific issues are removed from the ordinary political processes. *Hunter v. Erickson*, 393 U.S. 385 (1969); *James v. Valtierra*, 402 U.S. 137 (1971); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982).

The Colorado Supreme Court's decision is astonishing because it has, in effect, used the Equal Protection Clause to elevate the political agenda of a special interest group above the inherent right of the people to organize and constitute their government in accordance with the rule of law.

Such an extravagant, indeed reckless, reading of the Equal Protection Clause is neither supported by the constitutional text nor permissible under this Court's relevant precedents. The opinion of the Colorado Supreme Court should be reversed.

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1 *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 & n.6 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

ARGUMENT

I. Introduction

From the time of the founding of the United States of America to the present, the People of this nation, and of the 50 constituent states, have exercised their inherent right to limit the powers of their elected representatives by superior paramount law, the written constitution. Chief Justice John Marshall described this right as the People's "original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). He further asserted that this right was "the basis on which the whole American fabric has been erected." *Id.*

It is, wrote Marshall, the People's "original and supreme will [that]

organizes the government, and assigns to different departments their respective powers." *Marbury*, 5 U.S. (1 Cranch) at 176. It is, he continued, the purpose of a written constitution to "define" and "limit" those powers so as to impose a "superior paramount law" binding upon all departments of government. *Id.*

These words, penned by the great chief justice in the seminal *Marbury* case, affirmed a right of the People of the United States which was recognized previously in the Preamble of the United States Constitution[2] and in the nation's Great Charter, the Declaration of Independence. The Declaration stated the principle as a universal one, established by "the laws of nature and of nature's God" that:

> [G]overnments are instituted among men, deriving their just powers from the consent of the governed, that . . . it is the right of the people to alter . . . [any form of government] . . . organizing its powers in such form, as to them seem most likely to effect their safety and happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

This universal right of the People applies equally to the People of the States, as to the People of the United States. Both before and after the ratification of the United States Constitution, the People of each of the 50 states have exercised this right by constituting their own government, setting such limits on those governments as they will for their own peace, safety, and happiness.

The State of Colorado is no exception. Congress, in the act which enabled Colorado to join the Union, recognized the right of the people of Colorado to constitute the government of their state. Colorado

2 "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. PREAMBLE.

Enabling Act, 1A COLO. REV. STAT. (1980). Section 4 of the Act provided that the state constitution be "republican in form, and make no distinction in civil or political rights on account of race or color . . . and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Colorado Constitution, in turn, described this right of the People in Section 2 of its Bill of Rights:

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

COLO. CONST. art. II, § 1.

On November 3, 1992, the People of Colorado exercised this right, as the People of the United States and of the other 49 states have done for over two hundred years. By popular vote, they amended the Colorado State Constitution, forbidding their elected representatives from passing any law making homosexual, lesbian, or bisexual conduct or orientation the basis for a "protected status" or a "claim for discrimination."

But the courts of Colorado have denied the People this right to limit the power of their elected representatives. The Colorado Supreme Court has ruled that this foundational right has been superseded by a superior "fundamental right to participate equally in the political process."

This novel "fundamental right" is unprecedented. Chief Justice Rovira, writing for the majority, could not find it in the original Constitution or in the Declaration of Independence. *See Evans I*, 854 P.2d at 1276 n.8. Nor could he find it in any 'fundamental rights' opinion written by this Court or by any other court. To the contrary, he admitted that every voting rights case upon which he relied "addressed entirely distinct questions and constitutional problems from those presented here." *Evans I*, 854 P.2d at 1278.

But this did not deter him and his colleagues. Driven by a statement extrapolated from a single book written by a law professor and a student note published in the Harvard Law Review,[3] Chief Justice Rovira reinterpreted this Court's voting rights and race cases and crammed a new fundamental right into the Equal Protection Clause. He did so notwithstanding his own admission that the case before him fit "none of th[e] . . . three categories of [voting] cases" upon which he relied. *Id.* Further he did so relying upon precedents that this and other courts have clearly limited to cases involving racial discrimination. *Id.* at 1296-1300 (Erickson, J., dissenting).

Undeterred by these precedents, and ignoring this Court's clear instruction in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) not to use the Equal Protection Clause to create new substantive rights, the Colorado Supreme Court did just that -- it fashioned a new substantive right from the Equal Protection Clause. Armed with this new "right," the Colorado Supreme Court denied the original right of the People of Colorado to remove certain subjects and policy choices from the political process by superior law.

This ruling is contrary to the time-honored principle that America is a nation of laws and not men. The Court below substituted its own view of the fundamental principles upon which this nation was founded for those actually embraced by the People in the Declaration of Independence, in the United States Constitution, in the Colorado Enabling Act, and in the Colorado State Constitution. The Colorado Supreme Court placed itself above the People -- a grave error that must be reversed.

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3 *Evans I*, 854 P.2d at 1276. The student note has nothing to do with the issue in this case. It deals with political parties and political candidates. Note, *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1121 (1975).

II. Amendment 2 Does Not Infringe Upon Any Fundamental Right

A. The Right Of The People To Amend Their State Constitution Is Guaranteed By Article IV, Section 4 Of The United States Constitution

Article IV, Section 4 of the United States Constitution "guarantee[s] to every State in this Union a Republican Form of Government." James Madison, in Federalist No. 39, at 241 (Clinton Rossiter ed., 1961), defined a republic to be "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."

In a republic, the right of the People to limit the power of their government is exercised by adoption of a written constitution. In his *Rights of Man*, Thomas Paine wrote:

> A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without right.

PHILIP S. FONER, THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 375 (1974).

In his chapter on constitutions, Paine recounted how the governments of the original 13 states were established. Using Pennsylvania as his example, Paine documented how that state government was formed by the people through representatives commissioned for that purpose. This was accomplished by means of a written constitution containing, among other things, "the form which the Government should have, and the powers it should possess . . . the manner in which elections should be conducted, and the proportion of representatives to the number of electors." *Id.* at 377.

And so it has continued in the decades following as new states have entered the Union. The people of each state have exercised their

inherent authority to constitute the government for their state. As Thomas Cooley pointed out in his monumental work on state constitutional law:

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. They have created a national Constitution, and conferred upon it powers of sovereignty over certain subjects, and they create State governments upon which they confer the remaining powers of sovereignty, so far as they are disposed to allow them to be exercised at all.

COOLEY, CONSTITUTIONAL LIMITATIONS 28 (Spec. ed. 1987).

By this authority, the people have formed constitutions that "tie up alike their own hands and the hands of their agencies; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to these fundamental laws." *Id.* Even the right to participate in the ordinary processes of government has been determined by the constitution which in many instances has imposed significant limitations. *Id.* at 28-30.

What Paine and Cooley recognized is fundamental. A government cannot exist until it is constituted by the people. The constitution determines what rights a citizen will have to participate in the process of government. The right to vote, or the right to take a particular policy issue to one's elected representatives depends, in the first instance, upon the state constitution. Therefore, the right to constitute a government and to alter that constitution takes precedence over the right of anyone to participate in the processes of government. The latter right is not primary, but subordinate to the original right of the people to form a government.

B. Amendment 2 Does Not Conflict With Any Particular Provision Of The United States Constitution

This original right of the People of each State to constitute their government is limited by the United States Constitution only "in those particulars in which" a state constitution and the national constitution "would come in conflict." COOLEY, CONSTITUTIONAL LIMITATIONS at 21. Thus, the People of a state have no power to authorize any state or local official to "provide for titles of nobility, or . . . to violate the obligation of any contract, . . . [or to] exercise any power expressly or impliedly prohibited to the States by the Constitution of the Union." *Id.* at 33.

The very purpose of these limitations -- and others like them -- in the national constitution was to remove certain policy choices from a state's ordinary political processes. The people of any state who favored such policies were required to comply with the constitutional amendment process provided for in Article V of the United States Constitution in order to pursue their policy objectives.

When the people of Colorado passed Amendment 2, they were simply following this pattern. They placed the question of special legal protection for homosexuals, lesbians and bisexuals outside the authority of their elected representatives. Those who supported such protection were required to secure an amendment to the state constitution.

The Colorado Supreme Court acknowledged that there is nothing in the United States Constitution that guarantees legal protection from discrimination to homosexuals, lesbians, and bisexuals. *See Evans I*, 854 P.2d at 1285. Thus Amendment 2 cannot be found in conflict with any national constitutional provision guaranteeing such substantive protection.

Notwithstanding the lack of substantive constitutional protection from discrimination, the Colorado Supreme Court ruled that the Equal Protection Clause guarantees proponents of such protective legislation

access to their elected representatives. But there is nothing in either the Equal Protection Clause or in any other provision of the United States Constitution that ensures such special interest group access.

This Court in *Rodriguez* laid to rest any notion that the Fourteenth Amendment's Equal Protection Clause gave authority to the Court to devise equality rights based upon political, economic, or social assessments. The Court stated that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 411 U.S. at 33. Indeed, to mount an equal protection challenge alleging violation of a substantive right, a claimant must point to some right found explicitly or implicitly in some provision of the U.S. Constitution *other than the Equal Protection Clause of the Fourteenth Amendment itself. See id.*

Having acknowledged that the United States Constitution does not require a state to protect persons from discrimination on the basis of sexual orientation, there is no proof that Amendment 2 conflicted with any particular provision in the national constitution. Therefore, the People of the State of Colorado were within their right to determine "to what extent private rights shall be required to yield to the general good." COOLEY, CONSTITUTIONAL LIMITATIONS at 33.

C. The Equal Protection Clause Requires Only Uniform Treatment Of Similarly Situated Voters

Prior to the adoption of Amendment 2, the People of Colorado had placed a number of subjects and policy choices beyond the powers of their elected officials. For example, Article XVI, § 2 of the Colorado State Constitution requires the general assembly to "prohibit the employment in the mines of children under twelve years of age." Those who would desire to employ such children in the mines cannot take that policy objective to any state or local official. They must secure a constitutional amendment repealing the prohibition. Similar limitations are imposed on other special interest groups by the Colorado State Constitution in areas ranging from lotteries, Article XVIII, § 2, to

homestead exemptions, Article XVIII, § 1.

Regarding such matters, individuals and groups have access to the democratic process for amending the state constitution. After the adoption of Amendment 2, those who favor special rights for homosexuals, lesbians, and bisexuals are in no different position than any other group seeking a policy goal that has been forbidden by the state constitution. Those favoring laws protecting sexual orientation, then, have not been denied by Amendment 2 the right to participate equally in the political process.

While the process of constitutional amendment differs from the process of legislative enactment, the Equal Protection Clause does not guarantee any particular democratic process. As Chief Justice Earl Warren stated in *Kramer*:

> [T]he effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's formal influence is perhaps indirect, but it is equal to that of other residents.

Kramer, 395 U.S. at 627 n.7 (citations omitted).

So it is after Amendment 2 in Colorado. Those favoring special rights for homosexuals, lesbians, and bisexuals are now, for example, similarly situated with those favoring tax support for religious schools. *See* COLO. CONST. art. IX, § 7. Neither may accomplish their public policy goals by way of the ordinary legislative process. However, both may achieve those goals through the constitutional amendment process.

This is all that the Equal Protection Clause requires in fundamental rights cases. As Chief Justice Earl Warren wrote in *Reynolds*: "[T]he

concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds*, 377 U.S. at 565.

The proponents of gay rights legislation stand in the same relation to their government officials as do a number of other groups that favor certain public policy goals. They cannot use the Equal Protection Clause to obtain a *special* right to take their policy agenda to their state and local officials unencumbered by constitutional limitation.

III. Amendment 2 Does Not Unconstitutionally Discriminate Against Any Individual Or Group

A. Disparate Impact Alone Is Insufficient To Establish An Equal Protection Violation

Respondents claim that they are exempt from the equality principle that applies in the ordinary fundamental rights case because Amendment 2 removes an issue important to them, an alleged minority group, from consideration via the normal political process. *See Evans I*, 854 P.2d at 1272 n.2, 1273-74. The Colorado Supreme Court affirmed. It ruled that the Equal Protection Clause allowed the people of the state to "withdraw antidiscrimination issues as a whole from state and local control," but prohibited the people from singling out "one form of discrimination and remov[ing] its redress from consideration by the normal political processes." *See id.* at 1285.

In so ruling, the Colorado Supreme Court employed an erroneous equal protection standard. It made no finding that the People of Colorado purposed, by the enactment of Amendment 2, to discriminate against homosexuals, lesbians, or bisexuals. Nor did it make any finding that the supporters of Amendment 2 acted out of malice or prejudice towards homosexuals, lesbians, or bisexuals. It simply found that:

> Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Evans I, 854 P.2d at 1285 (citation omitted).

Even in cases of alleged discrimination against a constitutionally suspect class, this Court has consistently held that an equal protection claim cannot be proved by a discriminatory impact alone. *Washington v. Davis*, 426 U.S. 229, 239, 242-45 (1976). This same rule applies even when the discriminatory impact burdens a clearly recognized fundamental right guaranteed by the Equal Protection Clause. *Id.* at 240. Thus, this Court has consistently held that the right to vote is not infringed by any state law or policy solely because it has a discriminatory impact on an identifiable class of voters, suspect or otherwise. *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980) (plurality); *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality).

The Colorado Supreme Court extracted quite a different principle from this Court's voting rights cases. It ruled "that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." *Evans I*, 854 P.2d at 1279. But this Court has never adduced such a principle from its voting cases. To the contrary, it has rejected it.

In *Bolden* the claimant voter contended that the city's at-large electoral system unequally burdened the city's substantial minority black population. He claimed that the Equal Protection Clause commanded single-member district elections in order for minority blacks to achieve a

meaningful voice in the city's governmental affairs.

Dissenting Justice Thurgood Marshall, using language much like that of the Colorado Supreme Court, agreed. He found "a fundamental right to equal electoral participation that encompasses protection against vote dilution." *Bolden*, 446 U.S. at 114 (Marshall, J., dissenting). And he found evidence of vote dilution because the at-large system "effectively fenced out" an identifiable group from the political process. *Id.* at 122.

This Court rejected Justice Marshall's open-ended interpretation of the voting rights cases. *Bolden*, 446 U.S. at 75-80 (plurality). Instead, since *Bolden*, this Court has required proof of invidious discrimination against a constitutionally protected minority if a claimant were to succeed in striking down a particular electoral practice that diluted minority voting strength. *See Rogers v. Lodge*, 458 U.S. 613 (1982).

Had the court below paid attention to these precedents, it could not have transformed cases where such invidious discrimination had been proved into precedents establishing a fundamental right to participate equally in the political process. But it did just that on the strength of its revisionist views of the voting cases. *See Evans I*, 854 P.2d at 1278-79.

B. There Is No Proof Here Of Purposeful Discrimination Against A Racial Or Other Constitutionally Suspect Class

From *Reitman v. Mulkey*, 387 U.S. 369 (1967), to *Hunter v. Erickson*, 393 U.S. 385 (1969), to *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court has been solicitous of claims that the People of a state have acted in a way designed to prejudice a racial minority. Under the "suspect class" branch of Equal Protection doctrine, this Court has applied strict scrutiny only upon proof of such invidious discrimination. But it has refused to apply such scrutiny to cases where the offer of proof fell short of implicating a protected suspect class. *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971).

Taking *Hunter*, *Gordon*, and *Seattle School District*,[4] the court below concluded that they stand for the proposition that the Equal Protection Clause "protects the fundamental right to participate in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict scrutiny." *Evans I*, 854 P.2d at 1282 (footnote omitted). The Colorado justices extracted from these cases a principle that this Court has explicitly rejected.

Had the Colorado Supreme Court merely considered this Court's opinion in *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982), it would have discovered that none of this Court's justices asserted that *Hunter* and *Seattle School District* stood for any proposition other than one based upon race. Justice Powell in his majority opinion said this about *Hunter:*

> In Hunter the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in Hunter are missing.

Crawford, 458 U.S. at 537 n.14 (citations omitted).

Even dissenting Justice Thurgood Marshall did not disagree with this characterization of *Hunter*:

> California's Proposition I works an unconstitutional reallocation of state power by depriving California

4 *See Evans I*, 854 P.2d at 1279-82.

> courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against de facto segregation in the public schools. Despite Proposition I's apparent neutrality . . . . [it] is sufficiently "racial" to invoke the Hunter doctrine.

Crawford, 458 U.S. at 554-55 (footnote omitted).

Having conceded that a suspect classification was not an issue,[5] the court below disqualified *Hunter* and its progeny from further consideration under the Equal Protection Clause. Not only is this true because this Court has never read *Hunter* to apply outside of the racial context, but any broader reading of it will undermine the very rule of law that this Court is duty bound to protect.

IV. The Equal Protection Clause Does Not Guarantee Any Fundamental Right To Participate Equally In The Political Process

A. The Constitutionally Guaranteed Right To Vote Does Not Include A Right To Participate Equally In The Political Process

Prior to the ratification of the Fourteenth Amendment to the United States Constitution, this Court ruled that the judicial power of the United States did not extend to "the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849).

For years this Court turned away a number of constitutional challenges to state laws limiting the rights of individuals to participate in the state political process. *E.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875). During the period from the nation's founding until *Baker v. Carr*, 369 U.S. 186 (1962), this Court would not take jurisdiction of such a claim, unless the litigant could point to a specific constitutional guarantee of the particular right claimed. *E.g.*, *Gomillion v. Lightfoot*,

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5 *Evans I*, 854 P.2d at 1275.

364 U.S. 339 (1960).

After *Baker*, this Court began to apply the Equal Protection Clause to limit the state's power over the voting rights of its citizens. First, it held that the Equal Protection Clause prohibited a State, even when acting through the People by constitutional amendment, from apportioning any legislative body on any basis but "one person/one vote." *Lucas v. Forth-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964). Later, this Court relied upon the Equal Protection Clause to strike down poll tax, property, and residency restrictions limiting a person's access to the franchise. *E.g.*, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

In all of these voting cases, the complainant voters alleged and proved that they were being *deprived of an equal opportunity to determine the make-up of a legislative majority.* And in all of these cases, this Court simply ruled that the Equal Protection Clause prevented the state from diluting a voter's influence by malapportionment of the legislative body or by invidious restraints upon access to the ballot. *Bolden*, 446 U.S. at 77-78 (plurality).

In contrast, this Court has never held that the right to vote cases require strict scrutiny whenever the people of a state place a constitutional limit upon the legislative powers of their elected representatives. But the Colorado Supreme Court did. It concluded that this Court's voting cases require that particular issues be subject to the power of elected representatives lest supporters of those issues be unable to seek redress "by the normal political processes." *Evans I*, 854 P.2d at 1285.

Sensing the revolutionary nature of its ruling, the Colorado Supreme Court attempted to limit its extension of the voting rights case precedents to those instances where "a targeted class" has been deprived of the fundamental right to "obtain[] legislative, executive, and judicial protection or redress from discrimination . . . [without having to obtain] the consent of a majority of the electorate through the adoption of a

constitutional amendment." *Evans I*, 854 P.2d at 1285.

The Colorado Supreme Court, then, attempted to limit its novel "targeted class" to "independently identifiable groups." *Id.* According to the Court, such a group cannot be defined solely by its identity with the policy or subject of the challenged amendment. The class, the court asserted, must be identifiable "independently" from that policy or subject. *Id.* at 1281-83.

But the Colorado justices were unable to stick to their own rule. When the court addressed whether "homosexuals, lesbians, and bisexuals" are an "independently identifiable group," it concluded that they were -- solely on the basis of the policy and subject matter embodied in Amendment 2:

> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden – no other group's ability to participate in the political process is restricted and encumbered in a like manner."

Evans I, 854 P.2d. at 1285 (citation omitted).

This is an astounding statement! It is simply not true that no "other identifiable group" is burdened as homosexuals, lesbians, and bisexuals have been by Amendment 2. For example, Article XVI, Section 2 of the Colorado State Constitution requires mine owners to amend the state constitution if they wish to employ children under twelve years of age. Article XVIII, Section 1 requires creditors to amend the state constitution if they wish the constitutionally required liberal homestead

and other debtor exemption laws to be strictly construed. Those who seek legislative sanction for lotteries or for pari-mutuel gambling, other than those permitted by Article XVIII, Section 2 and Section 9 must seek a constitutional amendment.

The point here is that the voting rights precedents must be confined to the limits set by this Court lest the Equal Protection Clause be construed in a way that is inconsistent with the right of the People to limit the power of their elected representatives. The Colorado Supreme Court's ruling clearly demonstrates the wisdom that this Court has shown in its numerous precedents limiting the right to vote.

B. Any Right To Participate In The Ordinary Political Process Must Be Limited By The Right Of The People To Limit The Power Of Their Representatives By Constitutional Law

Every constitutional limit upon the power of the people's representatives, whether federal or state, removes one or more policy issues from the ordinary democratic process by which public policy is determined. If the Colorado Supreme Court's decision is upheld by this Court, it could be used to invalidate the Bills of Rights in the United States Constitution as well as in every state constitution. For by definition the limits on government power in those constitutional documents foreclose democratically enacted policies forbidden by their terms. Just a few examples will suffice to prove this point.

This Court has held repeatedly that the First Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from supporting certain activities in pervasively religious schools. *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Cf.* COLO. CONST. art. IX, § 7. Without question, this application of the Establishment Clause "fences out" an independently identifiable religious group from obtaining non-discriminatory access to public funding for the education of their children. According to the Colorado Supreme Court, the Equal Protection Clause would prohibit this as a denial of the minority religious group's "fundamental right to participate

equally in the political process."

This Court has also held that the First Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from enacting a "right of reply" statute requiring any newspaper that "assails" the character of a political candidate to print the candidate's reply. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Yet, this Court upheld a similar Federal Communications Commission (FCC) rule which applied to radio and television. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

This Court recognized in *Tornillo* that its ruling would fall heavily upon minority party candidates, yet it refused to be swayed by arguments on their behalf. *Tornillo*, 418 U.S. at 251-52. The *Tornillo* ruling left the minority parties with only one remedy: to seek and obtain a constitutional amendment to permit "right of reply" statutes. In contrast, the *Red Lion* ruling left the normal political processes open.

According to the formula of the court below, the *Tornillo* ruling violates the Equal Protection Clause because it fences out an independently identifiable minority from going to the state legislature and obtaining protection from newspaper assaults upon their character. In contrast, the *Red Lion* ruling would withstand Equal Protection scrutiny, because minority political groups still have access to Congress and the FCC to achieve their goals.

The point of these two examples is simple. Any religious group has a religious identity that "transcends the mere support for a single political issue" such as seeking funds for its religious activities. Such an independently identifiable group, however, is fenced out of the normal political processes in obtaining such funds for its religious purposes because of the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *State of Oregon v. City of Rajneeshpuram*, 598 F.Supp. 1208 (D. Or. 1984).

Likewise, minor political candidates and their parties have identities

transcending their support for legislation limiting the freedom of the press through a right to reply statute. Yet, they cannot achieve relief except through the extremely burdensome process of obtaining an amendment to the Freedom of Press Clauses of the First Amendment and of the constitutions of the fifty states, including Colorado. *See* COLO. CONST. art. II, § 10.

The Colorado Supreme Court's attempt to limit its newly minted fundamental right of equal participation in the political process to "independently identifiable" groups fails. There is simply no means to corral it. If followed to its logical extent, the court's newly created right would swallow the Bill of Rights and all other limits placed upon the powers of legislative bodies contained in the United States and State Constitutions.

CONCLUSION

In his 1958 Oliver Wendell Holmes lectures at Harvard Law School, the distinguished jurist, Learned Hand, cautioned his fellow judges that they not abuse their power of judicial review by substituting their judgment for that of the people's legislative representatives. He reminded them that America's founders had chosen a government ruled primarily by the people, and not by a "bevy of Platonic Guardians" sitting on the bench. HAND, THE BILL OF RIGHTS 73 (1960).

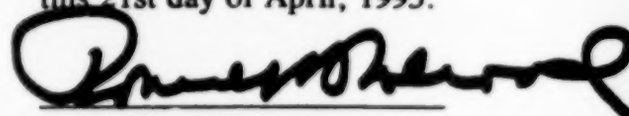
Judge Hand's admonition appears especially relevant here, where the people themselves -- not just their representatives -- have determined to resolve a disputed issue of policy. Even the Colorado trial judge, H. Jeffrey Bayless, acknowledged in this case that the role played by the people of Colorado was legitimate:

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied . . . for the passage of the Amendment . . . .
>
> There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998, at 73,837 (Colo. Dist. Ct. 1993).

The problem here is that neither Judge Bayless nor the Colorado Supreme Court took this observation to heart. Rather, they succumbed to the siren song of judicial activism, substituting their own wisdom in the name of the constitution for that of the people. This is not consistent with the lawful exercise of judicial power or with the constitution itself. For the reasons stated herein, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted
this 21st day of April, 1995.



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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case Nos. 94SA48 and 94SA128

BRIEF OF EQUAL RIGHTS, NOT SPECIAL RIGHTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. Amendment 2 Is A Permissible Exercise of Popular Sovereignty And Does Not Infringe On Any Fundamental Rights	7
II. The Colorado Supreme Court's Decision Would Either Invalidate All Popular Referenda Or Mandate A Discriminatory Political and Legislative Process	14
III. The Court Below's Decision Cannot Be Reconciled With This Court's Binding Precedent	20
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Barnes v. District of Columbia, 91 U.S. 540 (1876) 13

City Eastlake v. Forest City Enters., 426 U.S. 668 (1976) 11

Crawford v. Board of Educ., 458 U.S. 527 (1982) 25, 27

de Parrie v. State of Oregon, Nos. A83441, A83455, 1995 Or. App. LEXIS 570 (Or. App. Apr. 12, 1994) 17

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F.Supp. 1235 (S.D. Ohio 1993), *injunction made permanent*, 860 F.Supp. 417 (S.D. Ohio 1994) 1, 3

Gordon v. Lance, 403 U.S. 1 (1971) 3, 23, 24, 25, 26

Graham v. Richardson, 403 U.S. 365 (1971) 16

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 16

Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) 12

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 13

James v. Valtierra, 402 U.S. 137 (1971) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Newark v. New Jersey, 262 U.S. 192 (1923) 13

Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) 11

Shapiro v. Thompson, 394 U.S. 618 (1969) 16

TABLE OF AUTHORITIES – Continued

Page

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) ..... *passim*

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933) 13

CONSTITUTIONS AND STATUTES

Colo. Const. art. II, § 2 4

Colo. Const. art. V, § 1 4

U.S. Const. pmbl 11

U.S. Const. amend. I 11

U.S. Const. amend. IX 10

U.S. Const. amend. X 10

Or. Rev. Stat. § 659.165 (1994) 17

OTHER

The Declaration of Independence para. 2 10

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 16

Speech of James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 1 *The Founders' Constitution* (Philip B. Kurland and Ralph Lerner eds., 1987) 10

The Federalist No. 49 (James Madison) (Clinton Rossiter ed., 1961) 10

BRIEF OF EQUAL RIGHTS, NOT SPECIAL RIGHTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Equal Rights, Not Special Rights, Inc., a Cincinnati, Ohio-based non-profit educational organization devoted to pro-family issues, has a very strong and direct interest in the outcome of this case. In 1992, the Cincinnati City Council enacted a "Human Rights Ordinance" that prohibited discrimination in employment, housing, and public accommodation on the basis of sexual orientation. In response, *amicus'* predecessor organization, Take Back Cincinnati, organized a petition drive to place on the ballot a proposed amendment to the City Charter that would both repeal the sexual orientation provisions of the Human Rights Ordinance and prohibit City Council from enacting similar legislation in the future. That charter amendment, called Issue 3, was approved on November 2, 1993, by a vote of 62% to 38%.

On November 8, 1993, several individuals and organizations sued in federal court seeking to enjoin the implementation of Issue 3. *Amicus* was then formed for the purpose of defending the constitutionality of Issue 3, and it participated fully in the case as an intervening defendant. The district court, relying explicitly upon the Colorado Supreme Court's opinions in this case, entered first a preliminary, and then a permanent injunction against Issue 3. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994). *Amicus* appealed the district court's ruling on Issue 3, and oral argument was heard by a three-judge panel of the United States Court of Appeals for the Sixth Circuit on March 7, 1995. While there are some differences between the Issue 3 lawsuit and the case now before this Court, the "fundamental rights" aspect of both constitutional challenges is quite similar.

Because of the importance of this case to *amicus*, it submits this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

On November 3, 1992, Amendment 2, a proposed amendment to the Colorado Constitution sponsored by Colorado for Family Values, was passed in a statewide general election by a vote of 53.4% to 46.6%. In *Evans I*, the Colorado Supreme Court affirmed a trial court's preliminary injunction against Amendment 2, holding that:

> [T]he Equal Protection Clause . . . protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

Pet. App. D-21. The Court purported to discover this "fundamental right" after discussing four groups of this Court's equal protection cases – namely, those involving "preconditions on the exercise of the franchise," "reapportionment," "candidate eligibility," and "cases involv[ing] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." Pet. App. D-9-14. After conceding that the first three sets of these cases "addressed entirely distinct questions and constitutional problems from those presented here," Pet. App. D-13, the Court nonetheless concluded that they are all driven by a common principle, the "fundamental right

[1] Letters from both parties consenting to the filing of this brief have been filed with the Clerk of the Court.

to participate equally in the political process." Pet. App. D-14.

The linchpin of the Colorado Supreme Court's holding, however, is its interpretation of the fourth category of equal protection cases, beginning with *Hunter v. Erickson*, 393 U.S. 385 (1969), and including cases discussing the so-called *Hunter* doctrine. The Court, relying primarily upon this Court's holding in *Gordon v. Lance*, 403 U.S. 1 (1971), held that the rule of *Hunter* is not limited to the racial context in which it was announced, but rather stands for the proposition that the Equal Protection Clause is violated by any law that makes it more difficult for "any identifiable group" to enact legislation in that group's behalf. The Court therefore held that Amendment 2 must be subjected to strict scrutiny.

Subsequently, in *Evans II*, the Colorado Supreme Court reaffirmed its earlier holding in *Evans I*, Pet. App. B-7,[2] and then affirmed the district court's conclusion that the state had failed to meet its burden of showing that Amendment 2 is narrowly tailored to advance a compelling governmental interest. Pet. App. B-24. Accordingly, the Court affirmed the permanent injunction barring the enforcement of Amendment 2. This Court granted the State of Colorado's petition for a writ of certiorari on February 21, 1995.[3]

[2] In support of its decision to reaffirm *Evans I*, the Court noted that the federal district court in *Equality Foundation v. City of Cincinnati* had adopted the same legal theory – *i.e.*, that the Equal Protection Clause prohibits laws that infringe the so-called fundamental right to participate equally in the political process by making it more difficult for an independently identifiable group to enact legislation in its behalf – in the course of striking down Issue 3. *See* Pet. App. B-7 n.4.

[3] Beyond these facts, *amicus* adopts the Statement of the Case set forth in the opening Brief of Petitioners.

SUMMARY OF ARGUMENT

In response to a seemingly unexceptionable exercise by the Colorado voters of their right to self-governance, the Colorado Supreme Court went to truly astonishing lengths to concoct a brand new "fundamental right" that would, if affirmed, effectively eviscerate the people's right "to alter . . . their constitution and form of government whenever they may deem it necessary to their safety and happiness . . . . " Colo. Const. art. II, § 2; *see also id.*, art. V, § 1 (procedures for amending the state constitution through the initiative process). In a democratic society, courts are properly reluctant to invalidate such manifestations of popular sovereignty unless they are irreconcilable with a specific command of the United States Constitution. Here, however, the simple and regrettable fact is that this state supreme court has invalidated the votes of its citizens with no lawful warrant whatsoever.

1. Amendment 2 represents a perfectly rational determination by the voters of Colorado that government at all levels in that state should remain neutral on the contentious moral and political issue of whether citizens can, in their private associations and pursuits, take homosexuality into account. It was enacted in response to laws adopted by various political subdivisions of the state, as well as by certain statewide agencies, that prohibited state residents from acting on their sincerely held moral and religious beliefs that homosexuality – unlike, for example, race, ethnicity, or gender – is a morally relevant characteristic. By repealing those laws and preventing similar laws from being enacted in the future, Amendment 2 respects the right of all Colorado residents to accord to homosexuality such significance as they believe it warrants.

And that is all Amendment 2 does. It manifestly does not affect the right of any citizen to vote, to run for office, to lobby or to engage in political speech, to seek to amend the state constitution, or otherwise infringe the right of citizens to participate equally in the political process. To be sure, Amendment 2 does deny elected representatives of the state and its subdivisions the authority to adopt laws that would accord minority or preferential status to homosexuals. But that fact does not amount to a political disability or obstacle; it is, rather, the result of the fact that people have decided to enshrine this important policy decision in the state constitution.

Depriving elected officials of the authority to enact certain laws cannot be a denial of any right to lobby those officials or otherwise to participate in the political process. If the right to political participation did encompass a right to have local governments retain authority to make decisions favored by certain groups in the face of a contrary directive from the electorate, this would mean that state constitutions or state governments could never resolve contentious policy issues because all such decisions necessarily circumscribe the authority of lower-ranking government officials. As every high school civics student learns, the Constitution does not *limit* the people's ability to prevent unwarranted governmental intrusions – it is, instead, the ultimate manifestation of popular sovereignty. Simply stated, in a system founded on the notion that the people are the source of all governmental authority, with the power to grant and delimit the authority of their various elected representatives, it stands the system on its head to say that the Constitution requires that local representatives retain the right to override limits imposed by their constituents.

2. The Colorado Supreme Court's attempt to limit the "fundamental right" so that only "independently identifiable groups" can invoke it is totally unavailing. Once *Hunter* and its progeny are divorced from the

unique, race-specific context in which those cases arose, there is simply no principled ground for distinguishing between groups that can rely on this supposed "fundamental right" to invalidate elections and those that cannot. Indeed, every election on a popular referendum or initiative yields a "disadvantaged" group that can be characterized as "independently identifiable" – namely, the voters who lost. And because there is no basis for distinguishing between "independently identifiable groups" and the outvoted, any attempt to limit the availability of this license to overturn election results will necessarily place federal and state judges in the unacceptable position of deciding which elections they believe ought to be invalidated.

3. Finally, *amicus* will confirm what these preliminary observations necessarily suggest – that the "fundamental rights" theory adopted by the Colorado Supreme Court is not supported, much less compelled, by this Court's equal protection jurisprudence. The *Hunter* doctrine applies only in cases involving laws that impose unique political obstacles on racial minorities, a fact made clear beyond any doubt by this Court's subsequent decision in *James v. Valtierra*, 402 U.S. 137 (1971), where the Court expressly refused to extend *Hunter* to laws allegedly disadvantaging identifiable but nonracial groups. Moreover, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), is, like *Hunter*, a case about racial classifications, and it expressly did not otherwise recognize a "vested constitutional right to local decisionmaking." *Id.* at 498-99. Thus, because Amendment 2 neither burdens a suspect class nor infringes upon any fundamental right, it is constitutional if it is rationally related to a legitimate government objective, a test even the court below conceded Amendment 2 meets.

ARGUMENT

I. Amendment 2 Is A Permissible Exercise Of Popular Sovereignty And Does Not Infringe On Any Fundamental Rights.

By enacting Amendment 2, a majority of Colorado's voters determined that, on balance, it was best to restore government to a position of neutrality on the divisive political and moral issue of whether private actors may take account of homosexuality in their private associations and pursuits. The court below did not and could not suggest that this decision violated any substantive command of the Constitution. Plainly, the Constitution does not require inclusion of homosexuals in civil rights laws regulating private conduct, and so that decision is left to states or local communities to work out for themselves.

The Colorado Supreme Court nonetheless determined that, although Amendment 2 embodied a perfectly constitutional substantive decision, it unconstitutionally interfered with homosexuals' right to participate in the political and lobbying process. Pet. App. D-26. Yet Amendment 2 does not refer to the political or voting or lawmaking processes, and it certainly does not limit homosexuals' ability to participate in those processes. Amendment 2 in no way impedes homosexuals' access to the ballot, or to state or local legislators, or to the electorate; it does not diminish the weight of their vote, or otherwise impose the types of differential rules for political participation that have been the *exclusive* concern of this Court's political participation cases.

To be sure, after Amendment 2, neither local governments nor the Colorado state legislature can pass laws granting special protected status to homosexuals, and it would therefore be futile for homosexuals – or heterosexuals – to lobby them to do so. Prior to Amendment 2, however, supporters of homosexual marriage could not successfully lobby their local city council to sanction such

marriages, because they had been proscribed by the Colorado state legislature. Likewise, citizens could not successfully lobby the state legislature to admit gays into the U.S. military, because the U.S. Constitution lodges that decision with the federal government. But the inability to achieve desired political results from any particular governmental entity does not constitute a denial of a fundamental political right to lobby a local or state legislature, or otherwise to participate politically. Rather, it simply reflects the fact that a superior lawmaking entity has definitively resolved a public policy issue contrary to respondents' desires, thus rendering their lobbying of an inferior lawmaking entity superfluous.

In this case, the only difference is that the superior lawmaking entity is not the state or federal legislature, but the people of Colorado, who adopted Amendment 2 through the constitutional amendment process. It is undoubtedly permissible for the Colorado state legislature to bind political subdivisions,[4] and for the federal government to bind the Colorado legislature, on issues affecting "independently identifiable groups." It is therefore also permissible for the people of Colorado to control their representatives' legislative efforts, unless the federal

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[4] The Colorado Supreme Court did not suggest that it would be impermissible for the Colorado state *legislature* to bar political subdivisions from granting homosexuals protected status. The perceived constitutional deficiency was apparently not that the state had foreclosed lobbying of local governments, but that Amendment 2 foreclosed successful lobbying of "state *and* local government." Pet. App. D-27 (emphasis added); *see also* Pet. App. D-25 ("state and local control"). To the extent the court below was suggesting that state legislatures cannot control their political subdivisions or that certain public issues must be resolved at the local level, this contention is utterly without merit for the reasons discussed below. *See infra* at 12-13.

Constitution imposes some special prohibition on such exercises of popular sovereignty.

The Colorado Supreme Court created such a special prohibition by inventing a "fundamental right" for representatives to exercise ultimate control over the electorate. According to the court below, state and local legislatures must retain absolute veto authority over popularly-enacted amendments so as not to "disenfranchise" "independently identifiable groups" who seek to lobby those legislatures. Under that reasoning, unless the Aspen City Council and Colorado state legislature retain the right to make decisions favored by such groups, those groups cannot successfully lobby the City Council or legislature for the results they desire, and are thus denied their fundamental political rights. The constitutional problem, then, is not that homosexuals have been denied any *access* to state or local government, but that those governments have no authority to override the state constitution and give respondents what they want. Consequently, to avoid such a "deprivation," state constitutions cannot decide important public policy issues that adversely affect the political desires of an "identifiable group."

There is, however, nothing in the federal Constitution that prohibits the people from resolving important public policy issues for themselves or that requires them to delegate such important decisions to their employee representatives. The basic point is this: with respect to any controversial public issue, *somebody* must have the final say – either the people or their representatives. The necessary result of empowering one entity with such final authority is to render the potentially contrary decisions of the subordinate body ineffective, and thus to make lobbying of that body superfluous.

Contrary to what the court below concluded, the Constitution does not require elected representatives to

have final binding authority over their electors. The federal Constitution, like the Colorado Constitution, is premised on the basic principle that the people are the source of all legitimate authority, and that, as part of the social contract, the people retain the power to dictate the proper scope of governmental authority. This basic truth was noted by the Supreme Court as early as *Marbury v. Madison*: "[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . . " 5 U.S. (1 Cranch) 137, 176 (1803).[5]

Since *Marbury*, the Court has recognized this fundamental principle and praised popular initiatives as a salutary means of effectuating democratic self-governance:

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[5] *Marbury* simply distilled the central theme of our nation's founding. *See, e.g.*, The Declaration of Independence para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . . "); *The Federalist* No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; . . . "); Speech of James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 1 *The Founders' Constitution* at 62 (Philip B. Kurland and Ralph Lerner eds., 1987) ("[My position] is, that [the supreme power] *resides* in the PEOPLE, as the fountain of government; that the people have not – that the people mean not – and that the people ought not, to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."); U.S. Const. amends. IX and X.

"The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' " *City Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976) (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)); *see also James*, 402 U.S. at 141 ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). By approving Amendment 2, the voters of Colorado did nothing more than make such a "final decision, amounting to a veto," over prior decisions by local city councils to grant special protected status to homosexuals. Exercising such final authority cannot possibly run afoul of a Constitution "ordain[ed] and establish[ed]" by "We, the People." U.S. Const. pmbl.

The people of the various states are thus entirely free to use their constitutions to prevent local or state legislatures from passing laws that the people find unwarranted or inappropriate. This, indeed, is what constitutions do. The federal Constitution, and in particular the Bill of Rights, is nothing more than a series of directives from the sovereign people to their employee representatives regarding the type of laws the representatives may enact. According to the court below's logic, the First Amendment's directive to "Congress" that it "shall make no law respecting an establishment of religion" grossly violates the political participation rights of those who desire or benefit from religious establishments. Such religious observers are "singled out" and "disenfranchised" by the First Amendment because, unlike other groups, they cannot *successfully* lobby Congress for legislation that is important to them and benefits them – that is, laws funding or otherwise establishing religious organizations.

Amendment 2 places precisely the same type of limitation on Colorado's elected legislators as the First

Amendment imposes on Congress, and so it plainly cannot interfere with any political rights guaranteed by the First or Fourteenth Amendments. Rather, just as the First Amendment permissibly constrains federal representatives from passing laws that interfere with the people's freedom to act on their religious beliefs, so too does Amendment 2 permissibly direct Colorado representatives not to pass laws that interfere with the people's freedom to act on their religious or other beliefs concerning homosexual behaviors and lifestyle.

Alternatively, to the extent the Colorado Supreme Court was suggesting that the constitutional deficiency in Amendment 2 was that it resolved the question of whether homosexuals should enjoy protected status at the state – rather than at the local – level, this suggestion is equally devoid of merit. The fact that a state legislature or constitution resolves a particular policy question in a manner that forecloses inconsistent action by its political subdivisions does not in any way deny a right to lobby or participate politically. There is no "fundamental right" to petition local city councils to enact laws inconsistent with the state constitution, just as there is no "vested constitutional right to local decision-making" of important questions. *Washington*, 458 U.S. at 480 n.23. To the contrary, the state is entirely free to constrain the discretion of its political subdivisions, to order its internal government processes in any way it deems fit, and to resolve public policy issues at whatever level of government it desires. States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978). In the words of Mr. Justice Cardozo, a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in

opposition to the will of its creator." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933).[6]

Thus, just as the people may control their representatives' legislative efforts, so too may a state permissibly control the scope of the lawmaking authority of its political subdivisions. Accordingly, no one has a "right" to empower the local government to decide "gay rights" issues or any other issues. To the extent the court below determined that local governments must have such authority – to ensure that lobbying of those governments is "meaningful" – it is plainly wrong.

Were the rule otherwise, all laws restricting homosexual marriage, child custody and adoption would be unconstitutional because the various states have decided all such issues at the state level. Thus, respondents would have no more success lobbying the Aspen City Council to authorize homosexual marriages than it would having the Council grant special protected status to their group. If respondents' fundamental rights were truly deprived simply because the city council had no authority to deal with a particular issue, then their right to lobby on, for

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[6] *See also Washington*, 458 U.S. at 476 ("[S]chool boards, as creatures of the State, obviously must give effect to policies announced by the state legislature."); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . "); *Barnes v. District of Columbia*, 91 U.S. 540, 544-45 (1876) ("A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will.").

example, homosexual marriage has also been infringed by state law. A similar "deprivation," of course, has also been visited upon all the other groups who have an interest in the literally thousands of issues that local governments cannot resolve because they have been addressed by superseding state or federal law. There is, in short, no constitutional flaw in such preemptive state and federal laws.

II. The Colorado Supreme Court's Decision Would Either Invalidate All Popular Referenda Or Mandate A Discriminatory Political And Legislative Process.

The Colorado Supreme Court's revolutionary assault on self-government cannot logically be limited to the gay rights context. That being so, acceptance of its "fundamental rights" theory would either invalidate all popular referenda (and perhaps all state laws) or mandate an incoherent, discriminatory political regime that virtually insures success to judicially-favored special interests. We will examine each point in turn.

If Amendment 2 violates the so-called "fundamental right to participate equally in the political process," then the same is true of virtually all popularly-enacted constitutional amendments or referenda. *Every* time the citizenry enacts a statewide provision by direct popular vote, the necessary and intended effect is to take the matter being voted upon out of the hands of state and local elected representatives and place it directly in the hands of their principals, the people who elected them. And in every such case the losing side will suffer precisely the same alleged deprivation of political rights respondents claim here – an inability to lobby local governments or the state legislature to reverse the results of the amendment. Moreover, if the court below's rule applies to state legislation, then all such legislation is

unconstitutional because it inevitably circumscribes the authority of its political subdivisions and thus renders lobbying of those lower-ranking bodies futile.

The Colorado Supreme Court sought to avoid these absurd consequences by suggesting that the benefits of its new-found political right are limited only to those who are members of an "independently identifiable class of persons." Pet. App. D-21. This "limitation," however, is both illusory and irrational. First, it is not truly a limitation because virtually every group affected by a constitutional amendment or legislation will be "independently identifiable" – that is, defined by reference to some occupation, characteristic, or behavior distinct from how they voted on the particular measure. Gun owners, smokers, drug addicts, civil servants, incumbent politicians, ex-felons, farmers, insurance companies and virtually every other interest group share a common occupation or lifestyle choice that makes them "identifiable" wholly apart from their position on a particular referendum or legislation. Thus, any constitutional amendment or state law to limit gun ownership, civil rights protections for drug addicts, public smoking, parole rights, civil service salaries or terms of office will necessarily be invalidated because each such measure "singles out and prohibits [a] class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process." Pet. App. D-26. Indeed, with the possible exception of an across-the-board tax increase, it is difficult to conceive of any public policy issue that does not particularly affect an "independently identifiable group."

Moreover, the limitation the court below seeks to engraft on its own fundamental political rights theory is inconsistent with the very notion of a fundamental constitutional right. It is axiomatic that fundamental rights

apply to *all* individuals,[7] and that is no less true with regard to rights of political participation. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax because it infringed on fundamental right to vote). So if there truly were a constitutionally guaranteed right to lobby local and state government to overturn constitutional amendments, this right would necessarily inhere in *all* individuals and groups. There is no basis in logic or law for granting this fundamental right only to certain so-called "independently identifiable groups."

Yet the Colorado Supreme Court seemed to say that those citizens who unite in a group for the express purpose of lobbying or voting on public matters – for example, those opposed to tax increases or industrial pollution – will be denied the "fundamental right" the Court extends to other groups that can be identified by something other than a shared political agenda. Pet. App. D-23. Understandably, the court below never attempted to explain *why* this supposed "fundamental right to participate equally in the political process" should be granted to groups whose defining characteristics are unrelated to politics, yet denied to groups whose *raison d'être* is precisely such political participation.

The lower court's "independently identifiable group" limiting principle is, then, neither limiting nor principled.

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[7] *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (recognizing fundamental right to travel); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement."); *see generally* Laurence H. Tribe, *American Constitutional Law* at 1454 (2d ed. 1988) (all fundamental rights merit strict scrutiny).

Equally important, acceptance of this "identifiable" group concept would *require* suppression of constitutionally protected political activity and mandate that the federal judiciary arbitrarily choose winners and losers in virtually every policy battle. Under the regime of political favoritism adopted by the Colorado Supreme Court, "independently identifiable groups" will have a constitutionally-guaranteed right to overturn every state constitutional amendment (and perhaps every state law) that is adverse to their agenda, while groups that do not attain this exalted constitutional status will be deprived of that right. This "political rights" theory creates a situation where "independently identifiable groups" will either prevail at the ballot box or in court with respect to any amendment that adversely affects their interests, while unidentifiable groups will see any electoral victory over an identifiable group overturned in court.

For example, because Colorado for Family Values and similar organizations are presumably not among the favored groups, they presumably could not overturn a state constitutional amendment or a state statute *banning* private refusals to associate with homosexuals, although such a law would run directly contrary to their political, moral and religious interests.[8] Similarly, constitutional

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[8] This is not merely a hypothetical scenario. In response to the enactment by the people of numerous Oregon cities and counties of laws prohibiting those governments from according protected class status to homosexuals, the Oregon state legislature passed a law that preempted those local laws. *See* Or. Rev. Stat. § 659.165 (1994). Whereas Amendment 2 prohibits local governments from granting protected status to homosexuals, the Oregon law prohibits local governments from adopting measures that prohibit the granting of such status. That law, which was recently upheld by the Oregon Court of Appeals, *see de Parrie v. State of Oregon*, Nos. A83441, A83455, 1995 Or. App. LEXIS 570 (Or. App. Apr. 12, 1995), would, under *Evans I*,

amendments prohibiting state funding of private abortions or sectarian churches could never be enacted because they adversely affect the interests of "independently identifiable groups" (assuming poor pregnant women and religious groups satisfy this extraordinarily nebulous standard). By contrast, amendments *favoring* public financing of abortions or religious organizations would be constitutionally permissible because taxpayers and those with qualms about subsidizing abortions or religious practices are presumably not "independently identifiable."

Thus, under the court below's "fundamental rights" regime, the judiciary will directly dictate to the people of a state how they may resolve policy choices that the Constitution expressly leaves to their discretion. The people (and perhaps representatives) of the state are forbidden from making policy choices disfavored by any "independently identifiable group" (no matter how powerful or wealthy that group) since all such statewide decisions prohibit that group from seeking a contrary decision from local governments. Such a prohibition would infringe the "fundamental political rights" of those groups, such as Colorado for Family Values, that disagree with "independently identifiable groups," such as respondents. Indeed, the only restriction on political rights entailed here is caused by the injunction against Amendment 2, because it deprives Colorado for Family Values of the right to lobby their fellow citizens for legislation which they believe is necessary to prevent an unwarranted intrusion on their freedom to associate. Thus, the Colorado Supreme Court truly did "single out" and "disenfranchise" a group of Colorado citizens by

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plainly amount to a violation of the fundamental right of the supporters of those preempted local laws to participate equally in the political process.

denying that group access to a lawmaking procedure available to all other citizens – the constitutional amendment route.[9]

In light of these unacceptable implications of the Colorado Supreme Court's ruling, it is plain that the only permissible course is for the judiciary to remain neutral with respect to any democratically-enacted policy choice about which the Constitution itself is neutral. If the Constitution does not prevent a state from making a certain policy choice, it does not prevent the people (or legislatures) of that state from making that policy choice. Under the Constitution, the state need not establish a discriminatory, dual political system where certain special interests (*i.e.*, so-called "independently identifiable groups," such as homosexuals) may achieve their political goals through constitutional amendments (or state legislative action), but adverse, "unidentifiable" interest groups are denied all statewide avenues for achieving political success.

The same political process is available to the respondents as is available to all people who have lost a substantive electoral or legislative battle: they may seek to overturn the results by returning to the body which made the adverse decision (in this case, the Colorado electorate), or to a higher body (*e.g.*, the U.S. Congress). That is how Amendment 2 was enacted, and that is how it can be repealed. Yet, respondents nevertheless maintain that

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[9] If the Colorado legislature had banned from the ballot certain proposed constitutional amendments solely because of their content or viewpoint – that is, because they expressed a viewpoint that was contrary to the interests of independently identifiable groups – this law might well run afoul of the First and Fourteenth Amendments' guarantees of equal political participation. The Colorado judiciary therefore cannot enshrine such a viewpoint-based discriminatory denial of access in the name of the political rights protected by those Amendments.

their right to political participation has somehow been infringed because they do not have available to them a special, third option for overturning Amendment 2's substantive decision – namely, the "right" to have *lower*-ranking bodies like the local city councils or the Colorado legislature overturn decisions made by the people. But the Constitution does not guarantee any group in Colorado or the nation the right to have elected representatives overturn the decisions of those who elected them. And the lower court's insistence on granting respondents this special, third option is plainly preferential treatment that has nothing to do with even abstract principles of political *neutrality*, much less with any value that can be gleaned from the text, history or philosophical underpinnings of the Constitution. Accordingly, while the judiciary must invalidate all laws that prescribe unconstitutional policies – whether passed by the electorate or their representatives – it has no warrant to strike down laws prescribing perfectly constitutional policies simply *because* they are enacted directly by the people.

III. The Court Below's Decision Cannot Be Reconciled With This Court's Binding Precedent.

In addition to offending every basic notion of self-government and constitutional governance, the decision below is also contrary to the binding precedent of this Court. The Court has made it abundantly clear that popular referenda may definitively resolve issues adversely affecting identifiable groups, even though those referenda unequivocally foreclose identifiable groups from lobbying or petitioning the relevant legislative body to grant the benefits denied by the referendum. This Court's cases establish that popular referenda are unconstitutional only if the decision embodied in the referendum violates a substantive command of the Constitution.

There is no constitutional offense if the popular referendum makes a legitimate decision, even though this decision disables elected representatives from undoing that decision.

Specifically, under *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny, the Court will invalidate a popular referendum only when the mandate of the referendum is "suspect" because it contains (1) a racial classification which (2) imposes special obstacles on racial minorities in the political process. In other words, *Hunter* and its progeny are simply racial classification cases, not "fundamental rights" cases. While this Court has embraced the obvious principle that popular referenda are prohibited when they embody an unconstitutional decision such as a racial classification, it has never hinted that referenda embodying constitutional decisions are invalid because they interfere with some "fundamental right" to overturn that decision. Because Amendment 2 neither embodies a racial classification nor erects any special rules disadvantaging homosexuals relative to others who lose an election, *Hunter* and subsequent cases supply no basis for overturning that Amendment. The briefest review of applicable precedent makes this clear beyond peradventure.

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court upheld a constitutional amendment requiring popular referendum approval of all public housing projects previously authorized by the local city council. Two years earlier, in *Hunter*, this Court unanimously struck down a charter amendment requiring popular referendum approval of all racial fair housing laws previously authorized by the local city council. As the dissent in *James* emphasized, the only difference between these two cases was that the *Hunter* amendment imposed additional political burdens on a racial minority, while the *James* amendment imposed additional political burdens on a

nonracial, "independently identifiable group" – poor beneficiaries of public housing. The Court in *James* stated, in the plainest possible English, that this difference was constitutionally dispositive: "Unlike the Akron referendum provision [in *Hunter*], it cannot be said that California's Article XXXIV rests on *distinctions based on race*. . . . The present case could be affirmed *only by extending Hunter, and this we decline to do.*" *Id.* at 141 (emphasis added) (citations and internal quotations omitted).

If there were anything to the "fundamental right" invented by the Colorado Supreme Court, the challenged provision in *James* plainly would have been unconstitutional, because it "singled out" public housing beneficiaries and "disenfranchised" them by requiring that they, and they alone, convince both a majority of the city council *and* a majority of the electorate before they could garner beneficial legislation. The Court's failure to so hold further reaffirms that *Hunter* outlawed only the imposition of discriminatory burdens on racial minorities; it did not imply that popular referenda are prohibited from controlling the discretion of elected representatives.[10] And although the *James* Court acknowledged that the challenged constitutional amendment

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[10] Of course, *Hunter* itself made perfectly clear that the only constitutional deficiency with the challenged initiative was that it embodied a racial classification. The Court characterized the amendment as "an explicit racial classification," 393 U.S. at 389, and further stated that it was applying strict scrutiny solely because of that classification:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official discrimination based on race, racial classifications are constitutionally suspect, and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications.

Id. at 391-92 (citations and internal quotations omitted).

"hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage," it expressly concluded that this was not a constitutionally cognizable problem:

> But obviously a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

402 U.S. at 142.

One month after *James* was decided, a unanimous Court upheld yet another nonracial popular referendum in *Gordon v. Lance*, 403 U.S. 1 (1971). There, the Court upheld a West Virginia statute requiring super-majority approval in a popular referendum of any proposed increase in bonded indebtedness or state tax rates. Because *Gordon upheld* this super-majority requirement and popular referendum vote, it simply could not, as a technical matter, establish any constitutional rule *restricting* the permissible scope or contours of popular referenda. More important, since *Gordon* was decided one month after *James*, and did not mention *James*, much less distinguish it, it could not, as a rational matter, impose constitutional restrictions on popular referenda that *James* did not impose.

Yet the court below found that *Gordon*, in the course of upholding a nonracial referendum, somehow imposed limits on nonracial referendum that are wholly irreconcilable with *James*; the court interpreted *Gordon* to hold that such measures may not adversely affect "independently identifiable groups." Pet. App. D-21. But *Gordon* did not implicitly overrule *James* or otherwise impose this bizarre

requirement. A basic, threshold requirement for demonstrating that a law creates an impermissible "suspect classification" under the Fourteenth Amendment is to establish that there is, in fact, some class or group affected by the legislation. In the language seized upon by the court below, the *Gordon* opinion was simply making the obvious point that petitioners there had not even met this threshold criterion: they could not point to any "independently identifiable group or category" – much less a racial or suspect group – that was affected. *Gordon*, 403 U.S. at 5.

Thus, while *Gordon* confirms the obvious point that being a member of an "identifiable group" is a *necessary* prerequisite to mounting a *Hunter* claim, it nowhere implies that membership in such a group is *sufficient* to invalidate a referendum affecting that group. To the contrary, *Gordon* affirms that *Hunter* is strictly limited to prohibiting referenda that erect special political boundaries for racial minorities. The Court in *Gordon* expressly recognized that *Hunter* turned on the fact that the law in that case singled out a "discrete and insular minority." 403 U.S. at 5.[11] Because homosexuals are not a racial

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[11] This Court's subsequent decision in *Washington* further confirms that *Hunter*'s condemnation of popular initiatives was limited to those which imposed a racial classification burdening racial minorities. *See, e.g.*, 458 U.S. at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century – that 'the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race*.' ") (emphasis added); *id.* at 474 ("Given the *racial* focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.") (emphasis added); *id.* ("As in *Hunter*, then, the community's political mechanisms are modified to place effective decision-making authority over a *racial* issue at a different level of government.") (emphasis added); *id.* at 485 ("[T]he charter amendment at issue in *Hunter* dealt in explicitly *racial* terms with legislation designed to benefit minorities 'as minorities'. . . .") (emphasis added).

group or even a suspect class, they cannot satisfy this threshold requirement for seeking application of *Hunter*.

Amendment 2 is constitutional for an additional reason: homosexuals in Colorado have suffered no political burden remotely analogous to that suffered by the plaintiffs in *James*. Unlike the amendments at issue in *James* and *Hunter*, Amendment 2 does not change the political process at all, and it does not erect a unique political obstacle affecting only one type of legislation. Thus, this is a much easier case than even *James* or *Gordon* because Amendment 2 does not impose any "special burdens on [homosexual] minorities within the governmental process." *Hunter*, 393 U.S. at 391. The cognizable burden on the political process in both *James* and *Hunter* was the "double vote" requirement mandating that the relevant legislation be accepted only if a majority of the City Council *and* a majority of voters agreed. *See Crawford v. Board of Educ.*, 458 U.S. 527, 541 (1982) (discussing the *Hunter* ordinance; "[W]hereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle."). *Hunter* quite sensibly held that requiring only black citizens to win two votes before garnering favorable legislation was no more constitutional than requiring black citizens alone to take two driving tests before securing a license. It was this direct manipulation of the political and lawmaking process itself that imposed the discriminatory racial burden condemned in that case.

Here, there is simply no such alteration of the political or lawmaking process. As noted, Amendment 2 leaves the political process entirely alone; it simply makes a

substantive decision concerning the appropriateness of certain legislation. The persons who voted against Amendment 2 are in precisely the same position as any other group that has lost a popular initiative election and, if they choose to undo Amendment 2 through a constitutional amendment, will play by precisely the same rules as all others. Thus, unlike *James* and *Gordon*, the political and lawmaking process for gays and their supporters remains entirely neutral. The only harm respondents have suffered is the harm inevitably suffered by any group that loses an electoral battle on substantive policy. *Cf. Hunter*, 393 U.S. at 394 (Harlan, J., concurring) ("If the Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.")

It is true that, in the racial context, this Court in *Washington* held that a popularly enacted state-wide initiative could not unilaterally ban all integrative busing, even though it was constitutionally permissible for some local jurisdictions to voluntarily terminate mandatory racial balancing of their schools. For the reasons already stated, this decision has no application here because, as the Court took great pains to note, the sole constitutional deficiency in the Washington initiative was that it "rests on distinctions based on race." *Washington*, 458 U.S. at 485 (quoting *James*, 402 U.S. at 141).

We nevertheless further note that *Washington* did not lay down some blanket prohibition against state constitutions addressing issues that affect racial minorities or other suspect classifications. Resolution in a state constitution of issues ranging from affirmative action quotas to funding of private religious schools can all be fairly characterized as adversely affecting the "racial and religious groups" protected by *Hunter*. *Hunter*, 393 U.S. at 390. However, if a legislature is constitutionally free, for example, to impose a race-neutral contracting system or

deny state aid to pervasively sectarian institutions, state electorates should be at least as free to make such policy choices directly in the state constitution, regardless of whether the initiatives are opposed by religious or racial minorities.

Washington does not establish a contrary rule, but held only that, in light of Washington's highly unusual scheme of "emphatically . . . vest[ing] in local school boards" *all* control over educational issues, the state-wide busing initiative "worked a major reordering of the State's educational decisionmaking process." 458 U.S. at 478, 479. The *Washington* Court, however, repeatedly eschewed any interpretation of its opinion as more broadly forbidding resolution of sensitive racial issues in state constitutions or as establishing that such state-wide resolution constitutes a forbidden redistribution of political power. To the contrary, the Court emphasized that the states continue to be "accorded the widest latitude in ordering their internal governmental processes," and that its opinion created no "vested constitutional right to local decisionmaking." *Id.* at 476, 480 n.23 (quoting *id.* at 498-99 (Powell, J., dissenting)). More specifically, the opinion dismissed the dissent's accusation that the state may not intervene if "local employment or benefits are distributed on a racial basis to the benefit of racial minorities" as a "parade of horribles" "entirely unrelated to this case." *Id.* at 480 n.23; 498 n.14 (Powell, J., dissenting).

Equally important, on the same day it decided *Washington*, the Court, in *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), upheld a state constitutional amendment limiting court-ordered integrative busing, thus establishing that the electorate is free to address racial issues in state constitutions even over the objections of certain minority interests. As the Court noted, substantive policy decisions on racial issues, such as the anti-busing initiative in *Crawford*, do not "distort[ ] the political process for racial

reasons or . . . allocate[ ] governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541.

Accordingly, in addition to reaffirming that *Hunter* and *Washington* are limited to invidious racial classifications, the Court should confirm that popular referenda and state constitutional amendments may embody policy decisions that are compatible with the Constitution's substantive requirements, even if the Amendment deals with an issue of particular concern to racial minorities. Absent the unique circumstances present in *Washington*, popular referenda that do not address the electoral or lawmaking process "work[ ] a simple change in policy rather than a forbidden reallocation of power." *Washington*, 458 U.S. at 476. Thus, even assuming *Hunter*'s prohibition against additional burdens in the lawmaking process extended to nonracial groups, Amendment 2 is nonetheless constitutional because that straightforward policy determination does not alter or deny anyone access to the political or lawmaking process.

We note finally that even if the Court decides to substantially extend *Washington* to invalidate constitutional amendments of the sort at issue here, it should clarify that this prohibition cannot extend to popular referenda enacted by voters in *local* communities. Even in the unique situation presented in *Washington*, the only potential effect on the political process was that it transferred local "decisionmaking authority over the question [to] a new and remote level of government." *Washington*, 458 U.S. at 483. In contrast, where local referenda decide questions for the relevant political jurisdiction, local decisionmaking remains at a local level. The only change is that the citizenry, rather than the elected officials, make the challenged decision. As noted, nothing in *Washington* or any other case even hints that such popular decisionmaking is unconstitutional, and any such conclusion would be flatly irreconcilable with this nation's political

tradition of town hall meetings and constitutional tradition of a limited government with delegated powers.

In sum, Amendment 2 does not infringe any fundamental right and hence is constitutional because it so plainly advances a rational government interest.[12]

---

[12] Since it is abundantly clear that Amendment 2 has a rational basis, the Court should simply lift the injunction without a further remand to the Colorado Supreme Court. Indeed, that court itself held in *Evans II* that Amendment 2 serves the compelling (and therefore necessarily legitimate) governmental interests of protecting religious liberty and associational privacy. Pet. App. B-8, 13. The court held, however, that Amendment 2 is not narrowly tailored to serve those interests, a consideration that is irrelevant under rational basis review. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Amendment 2 thus preserves the citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the propriety of certain behavior. While enhancing freedom is always rational, it serves a particularly compelling interest in the context presented here. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Amendment 2 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question.

CONCLUSION

For the foregoing reasons, the rulings of the Colorado Supreme Court in *Evans I* and *Evans II* should be reversed, and this matter should be remanded to that Court with instructions to enter judgment for petitioners.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, et al.,
Respondents,

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iv

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 5

I. FUNDAMENTAL RIGHTS ARE INDIVIDUAL RIGHTS 5

A. Because Some Fundamental Rights Have Been Acknowledged Which Are Not Expressly Found in the Constitution, Courts Must Take Special Care Not to Invent Illegitimate Rights 7

1. This Court has Approached with Caution Invitations to Discover New Fundamental Rights 7

Page

2. Courts Have Refused to Discover Fundamental Rights Which Cannot Be Connected to Guarantees Existing in the Constitution and/or Long-Standing Tradition 10

B. The Newly Discovered Right of an Independently Identifiable Group to Participate Equally in the Political Process Expands the Concept of Fundamental Rights Beyond All Reason 12

II. SOCIETY MUST BE ABLE TO DRAW THE LINE ON ANTIDISCRIMINATION STATUTES WHICH INEVITABLY LEAD TO GROUP-BASED PREFERENCES 16

A. Group-Based Preferences, Even to Remedy Past Discrimination, Must Be Temporary 17

1. This Court's Decisions Hold That Remedial Affirmative Action Programs Must Be Temporary 18

2. Sound Policy Reasons Require Preferential Treatment to be Limited in Scope and Duration 20

Page

a. Group-Rights Theories Present Philosophical Problems at Odds with American Political Tradition 20

b. Group-Rights Theories Present Practical Problems in Their Application 23

B. States May Choose to Further Integration over Structural Separatism in Its Statewide Policies 27

CONCLUSION 28

TABLE OF AUTHORITIES CITED

Page

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RULES

Supreme Court Rule 37 1

Page

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Art. II, § 30b 3

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No. 94-1039

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and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, et al.,
Respondents,

**On Writ of Certiorari to the
Supreme Court of the State of Colorado**

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners, Roy Romer and the State of Colorado. All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the area of group-based preferences and fundamental rights will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases involving group preferences before this Court including *Adarand v. Pena*, Supreme Court Docket No. 93-1841, *United States v. Hays*, Supreme Court Docket Nos. 94-558 and 94-627, and *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

PLF believes that group-based special preferences, while originally intended as temporary measures to assist historically disadvantaged individuals to regain the ability to partake in the full opportunities of American society, have degenerated into an apparently unstoppable parade of self-proclaimed "victims" claiming special rights over and above those fundamental rights granted to every person under the United States Constitution. The People of Colorado opted to stem this tide, only to be thwarted by the state Supreme Court's creation of a new "fundamental right" which ultimately ensures that remedial programs are never-ending and that states are unable to define the parameters of special preferences within their own state constitutions.

For the reasons stated herein, the decision of the Supreme Court of the State of Colorado should be reversed.

STATEMENT OF THE CASE

In 1992, the People of Colorado amended their constitution as follows:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. Art. II, § 30b. The initiative, popularly called "Amendment 2," passed with 53.4% of the vote. *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994) (*Evans II*). Shortly after passage, various individuals and municipalities (including Denver, Boulder, and Aspen) sued to enjoin the amendment, arguing that it was unconstitutional. The lawsuit reached the Colorado Supreme Court twice: once to affirm the trial court's preliminary injunction (*Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*)), and once to affirm the permanent injunction (*Evans II*, 882 P.2d 1335). *Evans II* adopted and reaffirmed *Evans I*. *Evans II*, 882 P.2d at 1341.

The Colorado Supreme Court determined that Amendment 2 not only repealed existing special protections for homosexuals and bisexuals, but also prohibited "any governmental entity from adopting similar, or more

protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Evans I*, 854 P.2d at 1285. The court then found that Amendment 2 infringed upon the "fundamental right to participate equally in the political process" of "an independently identifiable group of persons" *Evans II*, 882 P.2d at 1339 (quoting *Evans I*, 854 P.2d at 1282). The essence of this "fundamental right" was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." *Evans I*, 854 P.2d at 1279. The court concluded that the "right" was infringed by Amendment 2 because (1) "[p]rior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation," *id.* at 1286, and (2) Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at 1285. That is, no matter how hard the advocates lobbied their municipal government to outlaw discrimination on the basis of sexual orientation, the state constitution forbids the enactment of any such ordinance.

The trial court rejected the plaintiffs' contention that homosexuals and bisexuals are a suspect or quasi-suspect class (because they are not politically powerless) and that ruling was not appealed to the state Supreme Court. *Evans II*, 882 P.2d at 1341 n.3. One justice dissented from the state court decision. Justice Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally mandated group-based fundamental right. He noted that "judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to

prevent--the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals." *Id.* at 1356 (Erickson, J., dissenting).

SUMMARY OF ARGUMENT

The Colorado Supreme Court erred in its creation of a group-based "fundamental right" by which any "independently identifiable group" must be permitted to "participate equally in the political process." Because fundamental rights are reviewed under strict scrutiny, they should not be created at the whim of a court. On the contrary, the discovery of a fundamental right must be drawn (either explicitly or implicitly) from the text of the Constitution to be legitimate. The new "fundamental right" created below is a vaguely worded promise of future litigation by every group dissatisfied by electoral results.

Moreover, the new "fundamental right" would hamstring state legislatures and citizens (in initiative states) from declaring statewide policy on *any* issue. The breadth of the "fundamental right" would destroy the entire state preemption doctrine. In this case, Colorado has made a deliberate policy choice to favor individual rights over group rights and integration over separatism. Given the nature of the practical problems inherent in group-based preferences, the state constitutional amendment limiting such preferences was certainly rational and is constitutional. For the reasons set forth below, the decision of the Colorado Supreme Court should be reversed.

ARGUMENT

I

FUNDAMENTAL RIGHTS ARE INDIVIDUAL RIGHTS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction

the equal protection of the laws." The "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Richmond v. J. A. Croson Company*, 488 U.S. at 493. The Constitution does not allocate constitutional rights to be distributed like block grants within discrete groups who share some personal characteristic. Constitutional rights are *individual* rights.

> [D]emocracy is not based on the premise of equal endowments, but of equal rights. It does not guarantee success, but it does aspire to equal opportunity. This opportunity is extended not to groups as such, but to individuals, because democracy respects the moral integrity of the human person, whose rights may not be casually subordinated to collective interests.

D. D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* at 250 (1991).

The Court's constant recognition of fundamental rights as individual rights is so oft-stated, that only a few examples will suffice to make the point here. In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983), this Court explicitly held that the Constitution must treat citizens as *individuals*, not "'as simply components of a racial, religious, sexual, or national class.'" Moreover, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), the Court identified in the Due Process Clause of the Fourteenth Amendment a fundamental *individual* right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, 431 U.S. 678, 688-89 (1977).

Thus, the proper application of the Equal Protection Clause "restrains those who would use the coercive power of government to redistribute rights and opportunities and thereby serves its intended function as a mighty bulwark for *individual* liberty." Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137, 139 (1991) (emphasis added).

A. Because Some Fundamental Rights Have Been Acknowledged Which Are Not Expressly Found in the Constitution, Courts Must Take Special Care Not to Invent Illegitimate Rights

1. This Court Has Approached with Caution Invitations to Discover New Fundamental Rights

To assure both the public and the lower courts that announcing rights not readily explicitly identified in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the states and the federal government, this Court has sought to identify the nature of the rights deemed fundamental, which then qualify for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), this category was held to include those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." This description was expanded in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), which characterized as fundamental those liberties that are "deeply rooted in this Nation's history and tradition." *See also Griswold*, 381 U.S. at 506; *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). Most cases involving fundamental rights are decided in the context of the Due Process Clause of the Fourteenth Amendment. Nonetheless, the analysis is equally applicable to fundamental rights analysis under the Equal Protection Clause of the same amendment. *Moore*, 431 U.S. at 503 n.10 (citing *San Antonio Independent School District v.*

Rodriguez, 411 U.S. 1, 33-34, *reh'g denied*, 411 U.S. 959 (1973)).

The basic principles of the Constitution are federalism and democracy--that is, decentralized, representative self-government. The existence of "open ended" constitutional provisions, blank checks for judicial policy making would be inconsistent with these principles. Graglia, *The "Open-Ended" Clauses of the Constitution*, 11 HARV. J.L. AND PUB. POL'Y 87, 88 (1988). The Court took a similar view in *Bowers*, 478 U.S. at 194-95, when it was presented with the opportunity to discover a fundamental right to homosexual sodomy:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. ... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Later, in *Michael H. v. Gerald D.*, 491 U.S. 110, *reh'g denied*, 492 U.S. 937 (1989), *and* 499 U.S. 984 (1991), (state statutory presumption that husband of child's mother is child's father held not to violate unwed putative father's rights under Due Process Clause of Fourteenth Amendment), the Court again counseled caution when venturing into the area of fundamental rights which have not yet been acknowledged:

> "Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as in the

> anticipation of the Framers ..., the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

Michael H., 491 U.S. at 122 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

Recognizing the ramifications of discovering a new fundamental right, in *Michael H.*, 491 U.S. at 127 n.6, Justice Scalia argued that the test to determine whether a right is fundamental (and thus protected), courts should focus on the most specific level of tradition that can be identified. This would ensure that the Court's decision, if it were to create a new right, would be narrowly construed. The Colorado Supreme Court, unfortunately, took the opposite tack, and produced a tremendously broad right that will, if upheld, apply to many more situations than that produced by Amendment 2. The decision of the court below seems particularly nonchalant about casting off this Court's fundamental rights jurisprudence. The decision below could not possibly be justified under this Court's statement that fundamental rights must include as an element that it be an interest traditionally protected by our society. The purpose of this component of the Due Process Clause is "to prevent future generations from lightly casting aside important traditional values--not to enable this Court to invent new ones." *Michael H.*, 491 U.S. at 122 and n.2. In this case, the Colorado Supreme Court specifically ventured where this Court urged it not to tread. The People of Colorado made a policy judgment as to the extent their antidiscrimination laws would protect nonsuspect classes and the court preempted it without express constitutional authority.

2. Courts Have Refused to Discover Fundamental Rights Which Cannot Be Connected to Guarantees Existing in the Constitution and/or Long-Standing Tradition

This Court, as well as others, has refused to create new fundamental rights which cannot be squared with the principles set forth above. For example, in *Bowers v. Hardwick*, 478 U.S. at 190, the Court refused to announce that the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. *See also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (refusal to find fundamental right to shelter in federal Constitution).

Duncan v. Louisiana, 391 U.S. 145, 148-49, *reh'g denied*, 392 U.S. 947 (1968), is an example of the numerous cases which have found "fundamental rights" in the Fourteenth Amendment--but rights which were specifically incorporated from rights guaranteed in the Bill of Rights. In *Duncan*, the Court recounted the various tests for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment: (1) whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; (2) whether it is based on our system of jurisprudence; and (3) whether it is a fundamental right, essential to a fair trial. The Court concluded that trial by jury in criminal cases is "fundamental to the American scheme of justice," and therefore held that the Fourteenth Amendment incorporates the Sixth Amendment guarantee to the states. Unlike the court below, these cases did not create fundamental rights out of whole cloth. Numerous express rights acknowledged in the bill of rights, and applying originally only to Congress, have been "incorporated" into the Fourteenth Amendment and thus applied to the states. For examples of cases involving

incorporated rights, *see, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying Eighth Amendment cruel and unusual punishment analysis to state action); *Tennessee v. Garner*, 471 U.S. 1 (1985) (applying Fourth Amendment seizure analysis to state action); *Marsh v. Chambers*, 463 U.S. 783 (1983) (applying First Amendment Establishment Clause analysis to state action).

Some lower courts have taken heed of the required caution. For example, even though fundamental rights of procreation (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)) and childrearing (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) have been recognized by this Court, the Fifth Circuit declined to discover a fundamental right to adopt a child.

> When does the "fundamental right to adopt" overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties--birth parents, child, adoptive parents--when legitimating adoptions.

Griffith v. Johnston, 899 F.2d 1427, 1437 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

Failure to be cautious usually leads to problems. The creation of new fundamental rights often leads to decisions which may not have been foreseen by the court discovering the new right but which logically follows from the discovery nonetheless. For example, the fundamental "right to die" has been the subject of a number of court decisions. *See, e.g., In the Matter of Karen Quinlen*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *Cruzan v. Director, Missouri Department of Health*,

497 U.S. 261, 277 (1990). Some courts have advanced some radical claims about the "right to die," and then extrapolated from that right, the right of people to end the lives of their relatives when they become burdensome. *See In re Jobes*, 108 N.J. 394, 408, 529 A.2d 434, 441 (1987) (cutting off treatment for a conscious patient who was able to respond to directions and lift her head because trial court concluded that she was in "a persistent vegetative state").

The combination of mandated caution when approaching fundamental rights and the empirical evidence of expansion of such rights beyond their original boundaries in virtually all instances should have prompted the Colorado Supreme Court to recognize that the issues involved in Amendment 2 did not involve a suspect class, and did not involve any recognizable fundamental right. Its error, if not corrected, could have lasting impact on the state's ability to set statewide policies.

B. The Newly Discovered Right of an Independently Identifiable Group to Participate Equally in the Political Process Expands the Concept of Fundamental Rights Beyond All Reason

The Colorado Supreme Court has given this case a rather bizarre twist. What began as a challenge to Amendment 2 on behalf of homosexuals and bisexuals is now concerned with an entirely different group of people. The suit was originally brought to argue that sexual orientation was a characteristic entitled to a special group status for all individuals who have that characteristic. The challenges to Amendment 2 spent considerable effort arguing that the historical and continuing societal views toward homosexuality and bisexuality warranted a special preference--the right to sue under discrimination laws as a protected class equal in statute to race, religion, and gender.

The Colorado Supreme Court was asked to decide the merits of a lawsuit in which a group identified as gay men, lesbians, and bisexuals asserted their interest in the ability to file nondiscrimination suits as a protected class. After the Colorado Supreme Court's decision, however, it is an entirely different group claiming an entirely different interest which is the subject of this Court's review. The new group is the coalition of those individuals (regardless of sexual orientation) who opposed a statewide initiative. This coalition may now assert as interest to participate equally in the political process. The court below, however, assumes that the second group is identical to the first. *Evans I*, 854 P.2d at 1285-86; *Evans II*, 882 P.2d at 1339. The reason for this erroneous assumption can be explained only be the court's result. When the court below recognized that this Court already decided that homosexual activity is not a fundamental right (*Evans II*, 882 P.2d at 1341), thus implicitly holding that homosexuals are not a class worthy of special protections above and beyond those held by all Americans, it created the first group-based fundamental right: for an independently identifiable group to participate equally in the political process.

This creation could well be on par with Frankenstein's monster. Fundamental rights are often subject to varying and expansive interpretations, even when they appear straightforward on their face. For example, the right to travel involves far more than border guards or border taxes barring entry to a state. This Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), extended the right to travel to strike down durational residency requirements to receive welfare benefits and nonemergency medical care. The implications of the vaguely worded new "fundamental right" constructed by the Colorado Supreme Court are staggering. It is easy to imagine the future litigation attempting to decipher what it means for an "independently

identifiable group to participate equally in the political process."

For example: What does "independently identifiable" mean? Who does the identification? Must the group be registered with the state? Must a court make the identification? Will the state legislature have to create a statutory list of approved groups? Does simple press coverage of a gathering of people make an identification?

Moreover, what level of support among individuals creates a "group"? Two persons? 20? 100? 10,000?

What does it mean "to participate"? To vote in an election? To sponsor an initiative? To campaign for a candidate or initiative? To be successful in pursuing a position? What does "equally" mean? Compared to what?

Finally, what is the "political process"? Voting? Lobbying? Sponsoring an initiative? Campaigning? Running for office?

Given the uncertainty inherent in every material term describing this "fundamental right," courts as well as citizens would have no idea how or when to invoke the right or how it should be adjudicated. The Colorado Supreme Court appears to have used a results-oriented approach to discover a fundamental right of its own design, thus creating a reason to apply strict scrutiny.

This new "fundamental right," particularly as relates to "equal political participation," would utterly destroy the ability of a state to declare an issue of statewide concern, thus preempting local legislation on the subject. In essence, the Colorado court would find that "equal political participation" is denied if a group cannot successfully lobby a local government to do what the Constitution forbids. Yet that is precisely the point of a constitution--to define and limit legislative power. Imagine this "right" applied to the federal Constitution: The First Amendment interferes with the right of religious groups to lobby their school boards for school prayer. *See Engel v. Vitale*, 370 U.S. 421 (1962). That amendment also interferes with the right of veteran's groups to "participate equally in the political process" because they cannot lobby for local ordinances prohibiting desecration of the American Flag. *See Texas v. Johnson*, 491 U.S. 397 (1989).

Not all political activity on any given issue is constitutionally proscribed, however. While the political process cannot be used to subvert a constitution, it can be used to *amend* that constitution. Amendment 2 in no way prevents any group from seeking an amendment to the Colorado Constitution to alter the terms of Amendment 2 (or any other provision). In short, Amendment 2 does not restrain political participation in the political process; instead, it is the result of such participation by the voters of Colorado.

The new "fundamental right" attributed to any independently identifiable group to participate equally in the political process cannot plausibly be restricted to the type of case at bar. This Court must remind the lower courts that careless use of words, especially where fundamental rights are concerned, will without question open the floodgates to additional claims:

> Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Snyder v. Massachusetts, 291 U.S. 97, 114 (1934), *overruled on other grounds in Duncan v. Louisiana*, 391 U.S. 145

(1968). For these reasons, this Court should reverse the decision of the Colorado Supreme Court.

II

SOCIETY MUST BE ABLE TO DRAW THE LINE ON ANTIDISCRIMINATION STATUTES WHICH INEVITABLY LEAD TO GROUP-BASED PREFERENCES

> Instead of a transformative nation with an identity all its own, America increasingly sees itself as preservative of old identities. Instead of a nation composed of individuals making their own free choices, America increasingly sees itself as composed of groups more or less indelible in their ethnic character. The national idea had once been *e pluribus unum*. Are we now to belittle the *unum* and glorify *pluribus*? Will the center hold? or will the melting pot yield to the Tower of Babel?

Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* at 2 (Whittle Communications, Knoxville, 1991), *cited in* Rose, *"Of Every Hue and Caste": Race, Immigration, and Perceptions of Pluralism*, 530 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 187, 200 (1993).

The civil rights struggle of the 1950s and 1960s secured the political rights and basic opportunities necessary for black Americans to fully enjoy the fruits of citizenship. Since then, however, the civil rights "movement" has been transformed into an establishment dedicated to perpetuating itself and expanding its power. The traditional civil rights movement derived its moral legitimacy from the universality of the rights it sought to establish. The modern civil rights establishment has abandoned this moral claim by transforming the meaning of civil rights from those fundamental rights all Americans share equally into special benefits for some and burdens for others. Bolick, *In Whose Name? The Civil Rights Establishment Today* at 7-8 (D.C., Capitol Research Center 1988), *quoted in* J. Conti and B. Stetson, *Challenging the Civil Rights Establishment: Profiles of a New Black Vanguard* at 5 (Praeger Press, Westport, 1993).

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

T. Sowell, *Civil Rights: Rhetoric or Reality*? (Rhetoric or Reality) at 109 (William Morrow & Co., N.Y., 1984). Just as the original goal of civil rights legislation--to provide equal opportunity to all Americans--has degenerated into quotas and "goals," there is no reason to believe that new politically active groups who choose to identify themselves in some manner will not also seek to parlay nondiscrimination into affirmative duties.

In this section of its brief, amicus addresses the broader issue of how a political body--a state--may, within constitutional bounds, limit the extent to which various groups are entitled to special privileges. Moreover, amicus argues that group-based privileges *should* be limited to the greatest extent possible and that this Court should not introduce new federal causes of action that would prevent states from making policy decisions based on individual rights.

A. Group-Based Preferences, Even to Remedy Past Discrimination, Must Be Temporary

This Court has recognized that the American tradition values individual rights over group rights. For example,

because group-based preferences necessarily infringe upon the individual rights of those who do not belong to the group, such preferences must be temporary. This Court has held that "benign" discrimination may occur only to remedy past discrimination (*Richmond v. J. A. Croson Co.*, 488 U.S. 469), so, as explained below, that once the remedy has been implemented, there is no constitutional requirement to use discrimination to *maintain* what has been achieved.

1. This Court's Decisions Hold That Remedial Affirmative Action Programs Must Be Temporary

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court held a constitutional affirmative action plan must, *inter alia*, be temporary. *Id.* at 208. This holding has been reaffirmed both by this Court and by many lower courts. For example, in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421, 479 (1986), the Court held that a court order to end union discrimination, the "'[p]referential selection of [union members] will end as soon as the percentage of [minority union members] approximates the percentage of [minorities] in the local labor force.'" (Quoting *Weber*, 443 U.S. at 208-09.) This Court, relying on *Weber*, held that court order operated "'as a temporary tool for remedying past discrimination without attempting to "maintain" a previously achieved balance.'" *Id.* (citing *Weber*, 443 U.S. at 216 (Blackmun, J., concurring)).

The emphasis on keeping preferential treatment temporary was reiterated in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In that case, the county promoted a female employee over a male employee to the job of road dispatcher pursuant to the county's affirmative action plan. This Court approved the open-ended plan in that case because the county used a "flexible, case-by-case approach" which expected only "gradual increases in the representation of minorities and women." *Id.* at 639. The Court cautioned, however, that

> [e]xpress assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. ... This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain ... balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the underrepresentation of minorities and women.

Id. at 639-40. The Court concluded that given the "Agency's express commitment to 'attain' a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance." *Id.* at 640.

Similarly, in *Local No. 93, International Association of Firefighters v. Cleveland*, 478 U.S. 501 (1986), an association of minority firefighters sued on a discrimination claim against the city regarding their lack of promotions. The Court held that the validity of race-based remedies must be consistent with *Weber*. Justice O'Connor, in a concurring opinion, noted specifically that "'prior discriminatory conduct' is the necessary 'predicate for a *temporary* remedy.'" *Id.* at 531 (O'Connor, J., concurring) (emphasis added). *See also Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

This Court has commented on restrictions of special preferences. For example, reverse discrimination is not justified by societal discrimination, which Justice Powell described as "an amorphous concept of injury that may be ageless in its reach into the past." *Regents of University of*

California v. Bakke, 438 U.S. 265, 307 (1978). It simply would justify too many suspect uses of classifications. Similarly in *Croson*, the Court concluded that a claim of social discrimination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" *Croson*, 488 U.S. at 498 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986)). This Court also rejected a social discrimination justification because its use increases the need for classifications. Race-conscious measures necessitate dividing people into racial blocs: victim blocs and oppressor blocs. The beneficiary of a program based on social discrimination cannot point to the specific wrong to highlight the obstacles to his achievement. Instead, the program "only reinforce[s] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298.

2. Sound Policy Reasons Require Preferential Treatment to be Limited in Scope and Duration

a. Group-Rights Theories Present Philosophical Problems at Odds with American Political Tradition

The concept of group rights holds that different cultures are *entitled* to both the preservation of their own culture and a certain share (generally reflecting the group's proportion of the population) of the community's assets. The group rights vision thus posits communal life as a zero-sum game in which groups must contend with one another *as* groups for scarce resources. Individual group members needs' are subordinated to the needs of the group. Nations like Switzerland, Canada, and Lebanon contain some aspects of the group-based model. C. Condit and L. Lucaites, *Crafting Equality: America's Anglo-African Word (Crafting Equality)* at 221 (Univ. of Chicago Press, Chicago 1993). In the United States, this model is evident in government-mandated affirmative action procedures in employment, education, and stipulated public programs, and court-ordered busing of school children across neighborhood district lines. Gordon, *Models of Pluralism: The New American Dilemma*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 178, 183 (1981) (*Pluralsim*). Group-rights advocates postulate a political and economic reward system which gives legitimacy to the standing and stake of various groups in the distributive process. This is reflected in calls for proportional representation in employment, education, legislative bodies and judiciaries. *Id.* at 184.

Group-based rights inevitably devolve into structural separatism. The logic of a system in which group membership plays a large role in educational access, occupational placement, income, political power, and similar matters pressures members of particular groups to stay within the group (so far as practicable) for marriage, friendships, institutional life, and social identity. Rationally, if a significant portion of one's interests are satisfied by emphasis on one's group membership, then one might as well stay within the group's boundaries while enjoying the social comforts of being among "people of one's own kind," where prejudice and discrimination are not present. *Id.* at 185.

On the other hand, in a nation based on individual rights, government does not formally recognize categories of people based on race or ethnicity (or religion or gender or age or disability or sexual preference). It is based on the premise that individuals earn economic and political rewards on the basis of merit and accomplishment. While compassion and the need for basic minimal rewards shore up those truly in need, above this minimal line individual merit prevails. Equality for citizens is defined as equality of opportunity (and equality before the law) but not in terms of results. A nation based on individual rights values the idea of individual meritocracy and the notion that current

generations should not be expected to pay for the sins of their fathers--or at least, those who lived here before them, whether genetically related or not. *Id.* at 187-88. As explored further below, when group-based measures such as forced busing and affirmative action are imposed on a fundamentally individual-rights based society, the measures create backlash and serve as a continuing major irritant in the relationship between individual members of groups.

Given the American emphasis on individual rights over group rights, how do group-rights proponents justify implementation of their theory? Some advocates of black group rights defend their perspective on the grounds that they have experienced unique disadvantages that justify the existence of black group rights although not white group rights. Of course, every group that has cast itself as a victim entitled to preferences will certainly argue that it, too, has suffered unique disadvantages, although some of the more recent "victim groups" (the overweight, the sensitive to fragrances, those with alternative lifestyles) have a more difficult time comparing their perceived or actual hardships with slavery and Jim Crow. In any case, this is a temporary rationale at best. At some point, that debt will have to be declared paid or canceled. Crafting Equality at 221. However, "it is not clear what formulas would be used to measure the designated completion of the process and whether, in fact, these procedures, if left in place for any length of time, would not simply become eventually a permanent part of the national pattern of operation." *Pluralism* at 183-84.

One of the problems of the decision below is that the "independently identifiable group" who loses a statewide initiative campaign cannot show that it has suffered discrimination in the past. Indeed the "group" may exist only in the context of the particular campaign. Political coalitions are often made for convenience and are fleeting once the object of the campaign has been resolved one way or the other. In this case, the People of Colorado chose to reject the "independently identifiable groups" vision based on group-rights theories. Instead, they voted to restrict the ability of new groups to claim a right to the preferences. This choice does not create any constitutional right of action.

b. Group-Rights Theories Present Practical Problems in Their Application

Groups rights permanently pit each group against the others in encounters that are bound to be at least sporadically violent, and which possess the potential for sustained and organized violence such as in India, Northern Ireland, South Africa, Bosnia, and Lebanon. Even here in the United States, the *New York Times* reported several instances of violence related to minorities demanding particular jobs:

> [A] growing number of groups demanding jobs for black and Hispanic workers have been disrupting construction sites in New York City, beating workers and extorting money for labor peace. ... The proliferation of these groups, called minority coalitions, has bred sometimes-violent competition, with members waging intramural gun battles in the fight over turf.

Threats Used to Push Jobs for Minorities, N.Y. TIMES, July 12, 1992, quoted in J. Bovard, *Lost Rights: The Destruction of American Liberty (Lost Rights)* at 194 (St. Martin's Press, N.Y., 1994).

Part of the problem with a group-rights system is that one must determine who belongs in which group. This is a bureaucratic nightmare. Currently in the United States, if individuals are one-eighth black, they are black. If a person's parents' native tongue is Spanish, then he or she is Hispanic--even if he or she is visibly black or, for the most part, English-speaking. *See* Barrett and Zachary, *Budding Backlash? Race, Sex Preferences Could Become Target in*

Voter Shift to Right, WALL ST. J., Jan. 11, 1995, at A1. White males of Spanish descent qualify as protected Hispanics, but whites of Portuguese descent do not. If a bureaucrat decides certain individuals look Asian, then they are. *Id.* With the rate of intermarriage between native-born Asians and those of European descent close to 50%, and for Hispanics about 30%, the whole business of identification reaches almost farcical levels. *Id.; see also* Kristol, *The Tragic Error of Affirmative Action*, WALL ST. J., Aug. 1, 1994, at A14 (bemoaning the "Balkanization of American" where everyone "wants a piece of the affirmative-action pie"); M. Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* at 33 (Charles Scribners' Sons, N.Y., 1991) (quoting Morris Abram, former head of the American Jewish Committee, challenging quotas as an "ethnic spoils system").

The arbitrariness of preferences has been well documented. One might inquire what, exactly, is the basis for special preferences? Skin color? Not always. The term "Hispanics," for example, encompasses both darker Mexican-Americans, and lighter Spaniards. Ramos, *Losers: White Minorities Get Shafted*, NEW REPUBLIC, Oct. 17, 1994, at 24: Historical discrimination? Again, there is no clear connection. It is a given that black Americans suffered discrimination for an abominably long time in our nation's history. But also entitled to special preferences on the basis of color/national origin are Hispanics, Native Americans, and Filipinos. *Id.* Even more interesting are the groups that are excluded. The Bureau of the Census counts Pennsylvania Germans (including Pennsylvania Dutch, Mennonites, and Amish) as a distinct ancestry group. Many of these groups, particularly the Mennonites and Amish, have faced discrimination for their differences and harassment for their pacifism during wartime. *Id.* Pennsylvania Germans also have a lower mean earnings, $10,339 per year, than the regulars on the affirmative action list. The exclusion of the Pennsylvania Germans points out the hypocrisy that inevitably envelops group-based decision making on ethnicity. *Id.*

Those who favor special preferences might argue that they are needed for the economically downtrodden. This does not solve the problem. If Argentines, the highest-paid Hispanic group, receives affirmative action benefits, perhaps the list should include every ethnic category less fortunate than they are. *Id.* at 25. In 1990, Argentines earned $15,956 per year on the job. Less successful were the Dutch, Finns, French, Scotch-Irish, Bulgarians, Croats, Slavic Macedonians, Slovenes, Brazilians, Assyrians, Cajuns, and the Pennsylvania Germans. *Id.* Of course, none of these groups ever makes the list. On the other hand, the Argentine threshold would *disqualify* such frequent list-makers as Pakistanis, Sri Lankans, Burmese, Chinese, Japanese, and Asian Indians, whose earnings average $25,198. *Id.* Preferences granted on any group basis are subject to this arbitrariness.

While group-based preferences have a long history in the field of education (*see Brown v. Board of Education*, 347 U.S. 483 (1954); *Green v. County School Board*, 391 U.S. 430 (1968); Bakke, 438 U.S. 265), various ethnic groups now demand more than simple access to the school of their choice--they have demanded to be taught in the language of their choice. In the 1970s, New Jersey implemented bilingual education to appease the demands of the large and growing Hispanic population. Burke, *Bilingualism/Biculturalism in American Education: An Adventure in Wonderland*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 164, 174 (1981). However, legislation was introduced in 1980 to repeal the law. The reason: After Spanish bilingual education was instituted and upheld in the courts, other ethnic groups demanded bilingual education, too. *Id.* This led to the nearly impossible task of trying to teach in the

following 10 languages: Spanish, Portuguese, Japanese, Haitian/French, Arabic, Vietnamese, Tagalog, Greek, Russian, and Korean. *Id.*

Problems also arise in contexts other than ethnicity and race. The recent excesses of the Americans with Disabilities Act, aptly demonstrate the how quickly individuals will jump on a slippery slope. For example, in Marin County, California, members of a group demanded that the county ban the use of perfume, cologne, aftershave, and hairspray in county buildings because they shared a "debilitating sensitivity to fragrances." Lost Rights at 186. In Fort Worth, Texas, a woman with cystic fibrosis sued a nightclub for discrimination because it did not ban all smoking on its premises as a "reasonable accommodation" for her special needs. *Id.* at 186-87. Even worse is the inclusion of individuals with infectious diseases as "disabled," and now entitled to special preferences. In the past, a person with a contagious disease bore the burden of proof to show that he or she was not a public health threat to work in a restaurant. Now a restaurant owner must prove that a contagious individual would pose a direct and substantial threat. *Id.* at 189. Thus, "[c]ivil rights law has gone from letting black people sit at luncheon counters to entitling people with infectious diseases to prepare and serve them lunch." *Id.*

As these examples have demonstrated, what may begin as a simple antidiscrimination statute inserts group-rights theories into the law with these inevitable results. Including sexual orientation in a discrimination statute can easily lead to regarding homosexuality as a positive source of human rights, entitled to affirmative action or preferential treatment hiring practices. The People of Colorado, already complying with the demands of racial, ethnic, gender, and other groups, decided to draw the line by denying special protections to a group (homosexuals and bisexuals) who do not have federal protections but who are not politically powerless.

B. States May Choose to Further Integration over Structural Separatism in Its Statewide Policies

From 1865-1965, the chief objectives of the civil rights movement were to integrate public accommodations and to eliminate black disfranchisement. Wilson, *The Black Community in the 1980s: Questions of Race, Class, and Public Policy*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 26, 27 (1981). Dr. Martin Luther King, Jr., spoke out against the separatism which results from pitting groups against one another:

> We do not have to look very far to see the pernicious effects of a desegregated society that is not integrated. It leads to "physical proximity without spiritual affinity." It gives us a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart .... It leaves us with a stagnant equality of sameness rather than a constructive equality of oneness.

King, Jr., *The Ethical Demands for Integration* (Dec. 27, 1962), in Washington, ed., *A Testament of Hope: the Essential Writings of Martin Luther King, Jr.*, at 118 (Harper and Row, S.F., 1986); Crafting Equality at 192.

However, after some experience with federal government support programs, the new civil rights establishment endorsed special preferences, arguing that to overcome both the legacy of "separate but equal" and current discriminatory practices, they needed special protection. *See* J. Jackson, *Straight from the Heart* at 322 (Fortress Press, Phila. 1987); Crafting Equality at 191. This advocacy of preference requires the repudiation of both the goals of color-blind justice and integration. It also requires group members

to maintain at least enough racial separation to perpetuate a stable group identity. Crafting Equality at 191.

Thus, group-based entitlements are inherently undemocratic. On the other hand,

> in opting for integration, a citizen denies his or her impulse to use our most arbitrary characteristics--race, ethnicity, gender, sexual preference--as the basis for identity, as a key to status, or for claims to entitlement. ... [I]ntegration [is] the inclusion of all citizens into the same sphere of rights, the same range of opportunities and possibilities that our Founding Fathers themselves enjoyed. Integration is not social engineering or group entitlements, it is a fundamental *absence* of arbitrary barriers to freedom. ... Anything that pushes anybody out of this sphere is undemocratic and must be checked, no matter the good intentions that seem to justify it.

Steele, *The New Sovereignty*, HARPER'S (July, 1992), *reprinted in* C. Cozic, ed., *Civil Liberties: Opposing Viewpoints* at 201, 206-07 (1994). The State of Colorado has chosen to promote the route of integration, rather than separatism. The People of Colorado, by statewide direct vote, chose to draw the line on group-based preferences. This Court should uphold their choice.

CONCLUSION

"Risks must be taken for genuine civil rights. But the kinds of internal struggles that have torn other multiethnic societies apart must be for something more than the continuing visibility of organizations or the continued employment of the their lawyers." Rhetoric or Reality at 118. The People of Colorado have chosen to place individual rights above group rights, consistent with the American tradition. No newly created "fundamental right," ill-defined and overbroad, should deny to Colorado the right to make statewide policy decisions relating to special preferences. For the reasons set forth above, Pacific Legal Foundation urges this Court to reverse the decision below.

DATED: April, 1995.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners

v.

RICHARD G. EVANS, et al.,

Respondents

On Petition For A Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA, INC. IN SUPPORT OF PETITIONERS

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40 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT

I. AMENDMENT 2, BECAUSE IT DOES NOT INVOLVE A FUNDAMENTAL RIGHT OR A SUSPECT CLASS, NEED ONLY BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST. 3

A. The Test for Rational-Basis Review 3

B. The Rational-Basis Test Applicable To State Constitutional Provisions. 5

C. Any Necessary Corrections Are for the Majoritarian Democratic Process To Make. 6

II. AMENDMENT 2 IS RATIONALLY RELATED TO LEGITIMATE -- IN FACT SUBSTANTIAL AND COMPELLING -- STATE INTERESTS. 8

A. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Public Morality. 8

1. Protecting Public Morality Is at Least a Substantial State Interest, under this Court's Decisions and Other Authorities. 8

a. This Court's Early Decisions. 8

b. This Court's Decisions Involving Obscenity. 9

c. This Court's Decisions Involving Public Indecency Statutes. 10

d. Other Authorities. 12

2. Legislation Based on Moral Determinations Is Rational. 12

a. Bowers Found It Not Only Rational but Necessary. 12

b. The Result under Equal Protection and First Amendment Review Is the Same. 13

3. Amendment 2 Protects Public Morality. 14

a. Colorado Has an Interest in Disapproving Homosexual Conduct, which Special Homosexual Rights Laws Would Preclude. 14

b. Homosexuality Is Not a Morally Neutral Characteristic (Such as Race or Sex), and Colorado Voters Have Therefore Determined that It Is Not Entitled to Special Protections. 16

i. The Majority Believe Homosexual Conduct To Be Immoral. 16

ii. It Is Entirely Rational (and even Logically Necessary) for Colorado Voters To Link Homo-

sexual Status with Homosexual Conduct. 17

4. Amendment 2 Permits More Moral Freedom than Do Special Homosexual Rights Laws. 20

B. Amendment 2 Is Rationally Related to the Legitimate State Interest in Promoting Heterosexual Families and Marriage, which Special Homosexual Rights Laws Undermine. 21

1. Courts Uniformly Acknowledge the State's Right To Promote Heterosexual Marriage. 21

2. Special Homosexual Rights Laws Necessarily Undermine the Longstanding Policy and Precedent Favoring Heterosexual Marriage. 23

C. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Religious Liberty. 24

1. Protecting Religious Liberty Is a Compelling State Interest. 24

2. Special Homosexual Rights Laws Violate Landlord and Employer Religious Rights. 24

3. Special Homosexual Rights Laws Violate Church and Parachurch Organizations' Free Exercise Rights. 25

D. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Economic Liberty. 26

1. The General Rule Is Autonomy in Economic Decisions, Such as Employment and Property Rental. 26

2. Sexual Morality Is Relevant to Economic Decisions. 27

3. Amendment 2 Protects These Economic Liberties from Restrictions. 28

III. SPECIAL HOMOSEXUAL RIGHTS LAWS DO CONFER "SPECIAL RIGHTS." 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

Attorney General v. Desilets, 636 N.E.2d 233 (1994) 24

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 10, 11, 12, 14

Beaty v. Truck Ins. Exchange, 6 Cal. App. 4th 1459, 8 Cal. Rptr. 2d 593 (1992) 21

Beer Co. v. Massachusetts, 97 U.S. 25 (1877) 8

Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981). 18

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) 19

Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986) 15

Bowers v. Hardwick, 478 U.S. 186 (1986) 11, 13

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 9

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 5

Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 23

County of Dane v. Norman, 497 N.W. 2d 714 (Wis. 1993) 23

D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991) 12

Davis v. Beason, 133 U.S. 333 (1889) 8

Dolan v. Tigard, 114 S. Ct. 2309 (1994) 27

Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) 7, 14

Elden v. Sheldon, 758 P.2d. 582 (Cal. 1988) 23

Employment Div. v. Smith, 494 U.S. 872 (1990) 22

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) 24, 25, 26

FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993) 4, 21

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Griswold v. Connecticut, 381 U.S. 479 (1965) 21

H.L. v. Matheson, 450 U.S. 398 (1981) 22

Harris v. McRae, 448 U.S. 297 (1980) 22

Heller v. Doe, 113 S. Ct. 2637 (1993) 3, 4, 5

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) 19

Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985) 22

Jacobellis v. Ohio, 378 U.S. 184 (1964) 10

Leisy v. Hardin, 135 U.S. 100 (1890) 8

Maher v. Roe, 432 U.S. 464 (1977) 22

Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (1990) 23

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 24

National Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided Court*, 470 U.S. 903 (1985) 19

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 18

Parham v. Hughes, 441 U.S. 347 (1979) 15, 21

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 9, 10, 11

Roth v. United States, 354 U.S. 476 (1957) 9

Smith v. Fair Employment and Housing Comm'n, 30 Cal. Rptr. 2d 395, 25 Cal. App. 4th 327 (1994), *review granted and opinion superseded*, 33 Cal. Rptr. 2d 567, 880 P.2d 111 (1994) 24, 25

State v. Cox, 627 So. 2d 1210 (Fla. App. 1993) 15

Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) 17, 18, 19

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S.Ct. 460 (1994) 25

Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 22

United States v. Biocic, 928 F.2d 112 (4th Cir. 1991) 12

United States v. Watkins, 28 Fed. Cas 419 (C.C.D.C. 1829) 8

Vance v. Bradley, 440 U.S. 93 (1979) 6

Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972) 15, 21

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) 19

STATUTES AND RULES:

Aspen, Col., Ordinance § 13-98 26

Boulder, Col., Municipal Code, tit. 12 26

Ga. Code Ann. § 19-3-6 (Michie 1982) 22

42 U.S.C. §§ 2000bb et seq. 25

OTHER AUTHORITIES:

Arizona Republic, Apr. 25, 1993, at A19 15

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INTEREST OF AMICUS IN THIS CASE[1]

Amicus curiae Concerned Women for America, Inc. ("CWA") is a national non-profit organization representing approximately 600,000 persons. CWA's purpose is to preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

CWA strongly supports protection of public morality, religious liberty, and economic liberty. CWA strongly opposes restrictions on voters' ability to protect these interests, particularly by a results-oriented creation of new "fundamental rights" in order to assist politically correct groups and restrict politically incorrect voters.

SUMMARY OF ARGUMENT

First, petitioners have demonstrated that the Colorado Supreme Court erred in creating a new fundamental right, and in therefore subjecting Amendment 2 to strict scrutiny under the Equal Protection Clause. Instead, because no fundamental right or suspect class is involved, Amendment 2 is subject only to rational-basis review.

Second, Amendment 2 should be upheld under rational-basis review, because it is rationally related to legitimate (even substantial and compelling) state interests.

Amendment 2 is rationally related to the state's in-

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[1]Counsel of record to the parties in this case have consented to the filing of this Brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

terest in protecting public morality, an interest that this Court and legal philosophers have historically recognized. It is entirely rational for the state to base legislation on moral choices (and it cannot avoid doing so). The moral choice made by Colorado voters in approving Amendment 2 was an effort to protect public morality, which is undermined by homosexual conduct and by the special homosexual rights laws that Amendment 2 repealed. Unlike race and gender, homosexuality is not a morally neutral characteristic.

Amendment 2 is rationally related to the state's interest in promoting heterosexual families and marriage, another interest with long-standing historical recognition. As the highest courts of at least two states have held, special homosexual rights laws undermine the states' policy favoring heterosexual marriage and family.

Amendment 2 is rationally related to the state's interest, a compelling interest, in protecting religious liberty. Special homosexual rights laws regularly conflict with the religious convictions of landlords, employers, churches, and religious organizations. Colorado was justified in adopting Amendment 2 to avoid those conflicts.

Amendment 2 is rationally related to the state's interest in protecting economic liberty. Special homosexual rights laws abrogate the traditional rule of autonomy and free choice in employment and other economic decisions, in favor of a group that is not a suspect or quasi-suspect class (and that is in fact affluent and politically powerful). In adopting Amendment 2, Colorado merely adhered to the long-standing interests in economic liberty.

Third, contrary to respondents' arguments, special homosexual rights laws do in fact confer special rights on homosexuals -- rights that are not enjoyed by other non-suspect classes who lack the homosexuals' affluence,

their political clout, and their claim to political correctness. Homosexuals already have the same rights everyone else has, but instead seek exemption from the general rule of autonomy and free choice that governs the activities of others. Colorado was justified in refusing to capitulate to the homosexual lobby's demands for special treatment, via a constitutional amendment adopted by a clear majority of its voters.

ARGUMENT

I. AMENDMENT 2, BECAUSE IT DOES NOT INVOLVE A FUNDAMENTAL RIGHT OR A SUSPECT CLASS, NEED ONLY BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.

Because Amendment 2 does not involve either a fundamental right or a suspect class, the Court applies only the "standard of rationality" to judge the validity of Amendment 2 under the Equal Protection Clause. *E.g.*, *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993).

A. The Test for Rational-Basis Review.

In *Heller*, this Court distilled decades of equal protection cases into the following statement of the rationality review standard:

> We many times have said . . . that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classifica-

tion neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "'it is not made with mathematical nicety or because in practice it results in some inequality.'"

Heller, 113 S. Ct. at 2642-43 (citations omitted). *See also FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'").[2]

B. The Rational-Basis Test Applicable to State Constitutional Provisions.

State constitutional provisions, such as Colorado's Amendment 2 in this case, are subject to the same deferential standard. In upholding Missouri's constitutional requirement that state judges retire at age 70, this Court held:

> In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it. "[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational."
>
> . . . .
>
> . . . "In an equal protection case of this type . . . those challenging the . . . judgment [of the people] must convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker."

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[2]After this Court's decision in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), some courts and commentators interpreted that case to have initiated a heightened level of review that came to be described as "active rational-basis review." In Heller, this Court put an end to that interpretation, saying explicitly that in Cleburne the Court did not "purport to apply a different standard of rational-basis review from that just described." 113 S. Ct. at 2643.

Gregory v. Ashcroft, 501 U.S. 452, 471, 473 (1991) (brackets in original) (citations omitted).

C. Any Necessary Corrections Are for the Majoritarian Democratic Process To Make.

This deference to policy choices of legislatures or of the citizens themselves (for state constitutional amendments, as in this case) is justified in part by the fact that any poor policy choice can be reversed by the same legislature or voters. As this Court held in *Vance v. Bradley*, 440 U.S. 93 (1979):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Vance, 440 U.S. at 97 (quoted in *Parham v. Hughes*, 441 U.S. 347, 351 (1979)).

Contrary to petitioners' implicit argument in this case, Amendment 2 is not presumptively unconstitutional because it represents the will of the majority of Colorado's voters. That approach should be rejected, and has been rejected:

> This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.

Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

As will be shown in Part II, the rational-basis review described above validates Amendment 2.

II. AMENDMENT 2 IS RATIONALLY RELATED TO LEGITIMATE -- IN FACT SUBSTANTIAL AND COMPELLING -- STATE INTERESTS.

A. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Public Morality.

1. Protecting Public Morality Is at Least a Substantial State Interest, under this Court's Decisions and Other Authorities.

a. This Court's Early Decisions.

For more than a century, at least, this Court has agreed that the government has a legitimate interest in protecting public morality. *See Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) ("Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, *and to the preservation of good order and the public morals*."); *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("It was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and *morals* of society."); *Leisy v. Hardin*, 135 U.S. 100, 123 (1890) ("it is not for Congress to determine what measures a State may properly adopt as appropriate or needful *for the protection of the public morals*, the public health or the public safety").[3]

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[3] *See also* United States v. Watkins, 28 Fed. Cas. 419, 425, 426 (C.C.D.C. 1829) (No. 16,649):

> The interests to be protected by the government are, the public peace, the public morals, the public property, and the public justice.
>
> . . . Why are public lewdness and disorderly houses indictable offences? Because they tend to injure the public morals, they are mischievous to many, -- to an indefinite number, -- to the public at large.

b. This Court's Decisions Involving Obscenity.

In subsequent cases, this Court reiterated the same interests. In upholding a criminal conviction for mailing obscene materials in *Roth v. United States*, 354 U.S. 476, 485 (1957), the Court recognized "the social interest in order and morality" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). This Court later described the *Roth* holding as follows:

> In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion [that there is a connection between antisocial behavior and obscene material] to protect *"the social interest in order and morality."* *Roth v. United States*, 354 U.S., at 485 . . . (emphasis added in *Roth*).

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

In *Paris Adult Theatre I*, this Court also held that "'the primary requirements of decency may be enforced against obscene publications,'" and that "legitimate state interests at stake in stemming the tide of commercialized obscenity . . . include the interest of the public in the quality of life and the total community environment." 413 U.S. at 57-58 (citations omitted). The Court also quoted approvingly an earlier dissent of Chief Justice Warren:

> As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society."

413 U.S. at 59-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion). Finally, this Court approved the Georgia legislature's conclusion about the negative effect of obscenity on the state's legitimate interest in public morality:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

413 U.S. at 63.

c. This Court's Decisions Involving Public Indecency Statutes.

More recently, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court upheld Indiana's public indecency statute. Four members of the Court did so explicitly on the basis of the state's legitimate interest in promoting public morality. The plurality opinion stated:

> The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. . . . [T]he statute's purpose of *protecting societal order and morality* is clear from its text and history. . . . Public indecency statutes such as the one before us reflect *moral* disapproval of people appearing in the nude among strangers in public places.
>
> . . . .
>
> This and other public indecency statutes were designed *to protect morals and public order*. The traditional police power of the States is defined as the authority to provide for the public health, safety, and *morals*, and we have upheld such a basis for legislation. [citing *Paris Adult Theatre I* and *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).]
>
> Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

501 U.S. at 569 (plurality opinion of Rehnquist, C.J.).[4]

Justice Scalia agreed in even stronger terms:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." The purpose of the Indiana statute . . . is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.

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[4] Throughout this brief, all emphasis is added unless otherwise noted.

501 U.S. at 575 (Scalia, J., concurring).[5]

d. Other Authorities.

Legal philosophers, perhaps most notably Lord Devlin, have reached the same conclusion: "there are certain standards of behavior or moral principles which society requires to be observed," and "[a] recognized morality [is] as necessary to society's existence as a recognized government." P. Devlin, *The Enforcement of Morals* 8, 13 (Oxford Univ. Press 1959). Thus, conduct cannot be viewed in isolation from its effect on society's moral consensus. *Id.* at 8.[6]

2. Legislation Based on Moral Determinations Is Rational.

a. *Bowers* Found It Not Only Rational but

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[5] *See also* D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 145 (4th Cir. 1991) ("It is also well-established that the regulation of nudity in public places advances a substantial governmental interest in maintaining order and morality. . . . [T]he interest in *morality and order* underlying the city's regulation of public nudity is a sufficiently compelling governmental interest to override some incidental effects of the communicative aspects of topless dancing."); United States v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important governmental interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones.")

[6] *But see* Hart, Law, Liberty, and Morality 43 (Stanford Univ. Press, 1963) (attempting to distinguish "between the immorality of a practice and its aspect as a public offensive act or nuisance").

Necessary.

This Court has made it unequivocally clear that, standing alone, moral determinations by legislators or voters are adequate rationales for legislation. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), one of the homosexual plaintiff's attacks on Georgia's criminal sodomy statute was that a moral justification for the law was inherently inadequate. The Court flatly rejected Hardwick's argument:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. *The law, however, is constantly based on notions of morality*, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.

478 U.S. at 196. *See also id.*, 478 U.S. at 196, 197 ("Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian *moral* and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of *moral* teaching.") (Burger, C.J., concurring).

b. The Result under Equal Protection and First Amendment Review Is the Same.

While *Bowers* involved rational-basis review under the Due Process Clause, the result is identical under equal protection rational-basis review and under First Amendment review. *See Barnes*, 501 U.S. at 568-69 (plurality opinion of Rehnquist, C.J.) ("Public indecency statutes . . . reflect moral disapproval of people appearing in the nude among strangers in public places. . . . [T]he public indecency statute furthers a substantial interest in protecting order and morality); *id.*, 501 U.S. at 580 ("*Moral opposition to nudity supplies a rational basis for its prohibition.*") (Scalia, J., concurring). As Judge Bork wrote in *Dronenburg*:

> Appellant denies that morality can ever be the basis for legislation. . . .
>
> . . . Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality. For these reasons, appellant's argument will not withstand examination.

741 F.2d at 1397.

3. Amendment 2 Protects Public Morality.

a. Colorado Has an Interest in Disapproving Homosexual Conduct, which Special Homosexual Rights Laws Would Preclude.

This Court has previously recognized the state's rational and legitimate interest in condemning

"irresponsible liaisons beyond the bonds of marriage." *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972); *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality opinion of Stewart, J.). *See also Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986) (Scalia, J.), holding that the government is entitled to voice its own approval or disapproval of ideas (and therefore of actions as well); otherwise, it would be permissible for the government "to criminalize polygamy, but not to praise the monogamous family.").

It follows that if Colorado may criminalize sodomy, and may criticize the morality of homosexual conduct while praising heterosexual marriage, it may constitutionally preclude the adoption of special homosexual rights laws.

The special homosexual rights laws that were repealed by Amendment 2 would preclude any government disapproval of homosexual behavior, with significant consequences for heterosexual marriage and other state policies, such as adoption. Professor Finnis, Oxford Professor of Law and Legal Philosophy, has written:

> It is in fact accepted by almost everyone, on both sides of the political debate, that the adoption of a law framed to prohibit "discrimination on grounds of sexual orientation" would require the prompt abandonment of all attempts by the political community to discourage homosexual conduct by means of educational policies, restrictions on prostitution, non-recognition of homosexual "marriages" and adoptions, and so forth. It is judged (and in my view soundly) that the law itself would perforce have changed from teaching, in many ways, that homosexual conduct is bad to teaching, massively, that it is a type of sexual activity as good as any other (and per se much less involved with onerous responsibilities

> than is the sexual union of husband and wife or, in perhaps other ways, the life of those who live in unmarried chastity).

Finnis, *Law, Morality, and "Sexual Orientation,"* 9 Notre Dame J. of Law, Ethics & Public Policy 11, 16 (1995).[7]

b. Homosexuality Is Not a Morally Neutral Characteristic (Such as Race or Sex), and Colorado Voters Have Therefore Determined that It Is Not Entitled to Special Protections.

i. The Majority Believe Homosexual Conduct To Be Immoral.

The empirical fact is that a majority of Americans, and obviously a majority of Colorado voters, believe homosexual behavior is immoral. Professor Duncan has compiled relevant statistics:

> For example, a 1992 Gallup Poll found that 57% of Americans deemed homosexuality an unacceptable lifestyle, with 38% believing it to be acceptable. *Arizona Republic*, Apr. 25, 1993, at A19. A major survey conducted by the Kinsey Institute in 1970 confirms that a majority of Americans believe that homosexual behavior is wrong. Albert D. Klassen et. al., *Sex and Morality in the U.S.: An Empirical Enquiry Under the Auspices of the Kinsey Institute* 26-27 (Hubert J. O'Gorman ed., 1989).

Duncan, *Who Wants To Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Free-*

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[7] An example of a state policy that would be abandoned under a special homosexual rights law is State v. Cox, 627 So. 2d 1210 (Fla. App. 1993) (state policy against homosexual adoptions upheld as rational).

dom, 69 Notre Dame L. Rev. 393, 405 n.41 (1994).

Similarly, the voters of Colorado believed, by a margin of 53.4% to 46.6%, that homosexuals should not enjoy special legal protections that are not available to anyone else who is not already in a protected or suspect class. Given the results of other polls showing the electorate's moral disapproval of the homosexual lifestyle and homosexual behavior, it is reasonable to conclude that a majority of Colorado voters did not believe that homosexuality is a morally neutral characteristic, such as race or sex. Instead, the majority of Colorado voters saw homosexuality as a characteristic or behavior that is subject to moral assessment, and they found it lacking morality.

ii. It Is Entirely Rational (and even Logically Necessary) for Colorado Voters To Link Homosexual Status with Homosexual Conduct.

Proponents of special homosexual rights protections insist that homosexuality is a status, rather than a behavior subject to moral assessment. However, it would be eminently rational for the voters of Colorado to reach the conclusion that many or most homosexuals in fact engage in homosexual conduct; i.e., that they do what they advocate and defend as an alternative lifestyle and as alternative sexual conduct. That conduct undoubtedly can be assessed morally.

The Court of Appeals for the District of Columbia Circuit reached the same rational conclusion in *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc). In *Steffan*, the court upheld (again) Naval Academy regulations and Department of Defense directives prohibiting homosexuals from attending the Academy or serving in the Navy. The court rejected Steffan's argument that his description of himself as a homosexual was no evidence that he in fact had committed or would commit homosexual acts:

> [T]he military may reasonably assume that when a member states that he is a homosexual, the member means that he either engages or is likely to engage in homosexual conduct. . . .
>
> . . . That there may be exceptions to the assumption on which the regulation is premised is irrelevant, however, so long as the classification (the regulation) in the run of cases furthers its purpose, and we readily conclude that it does.
>
> . . . .
>
> . . . Although there may well be individuals who could, in some sense, be described as homosexuals based strictly on an inchoate orientation, certainly in the great majority of cases those terms are coterminous. Homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct.

41 F.3d at 686, 689 (quoting then-Judge Kennedy to the same effect in *Beller v. Middendorf*, 632 F.2d 788, 808 n.20 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981). Similarly, in an earlier decision, the same court had described homosexual sodomy as "the behavior that defines the class." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (upholding FBI's refusal to hire homosexual).[8]

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[8]The court in Padula bluntly went further than the voters of Colorado have gone:

> If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

822 F.2d at 103. Colorado has stopped well short of discriminating against homosexuals (though it need not

The Seventh Circuit has reached the same result as the District of Columbia Circuit. In fact, in *Steffan*, the District of Columbia Circuit quoted the following language from *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989):

> Plaintiff's lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and a propensity to engage in homosexual conduct. Such an assumption cannot be said to be without exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future. The Army need not shut its eyes to the practical realities of this situation. . . .

881 F.2d at 464. *See Steffan*, 41 F.3d at 689.[9]

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under the Equal Protection Clause), and merely prohibits special protections of homosexuals.

[9]Other Courts of Appeals have also rejected challenges to rules against homosexuals in the military and state statutes against public homosexuality in public school teachers. *See* High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding policy of expanded investigation into backgrounds of homosexual applicants for security clearances as rationally related to legitimate government interest in protecting national security); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (upholding Navy's release of reserve member from active duty); National Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984) (upholding

4. Amendment 2 Permits More Moral Freedom than Do Special Homosexual Rights Laws.

The citizens of Colorado are more free to make their own moral determinations under Amendment 2 than they were under any special homosexual rights law at the state or local level. Under Amendment 2, those who see homosexuality and its attendant behavior as immoral may choose not to rent to or employ homosexuals; those who see homosexuality as moral or at least neutral are free to rent to or employ homosexuals.[10] By contrast, as Professor Duncan has pointed out, "[u]nder [the special homosexual rights laws repealed by Amendment 2], a particular view of sexual morality, the sexual relativism of social liberals, is codified and imposed on everyone else." Duncan, 69 Notre Dame L. Rev. at 396 n.10.

As Justice Stevens has recognized, a presumption in favor of freedom from regulation is itself a rational basis for a decision not to regulate (such as Amendment 2):

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state statute providing for dismissal of public school teachers for engaging in public homosexual conduct), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

[10]Duncan and Young elaborate the contrasting levels of freedom with Amendment 2 and without it:

> Under Amendment Two and its progeny, however, employers and landlords are not forbidden from hiring or leasing apartments to homosexuals. They are completely free to do so, if they wish. The initiatives do not single out homosexuals for restrictions or prohibitions; they merely remove governmental restrictions on employers and property owners in order to protect basic civil liberties in the marketplace.

Duncan and Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. L. Ethics & Pub. Pol'y 93, 133 (1995).

> Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom.

FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2105 (1993) (concurring opinion) (emphasis in original).

B. Amendment 2 Is Rationally Related to the Legitimate State Interest in Promoting Heterosexual Families and Marriage, which Special Homosexual Rights Laws Undermine.

1. Courts Uniformly Acknowledge the State's Right To Promote Heterosexual Marriage.

The federal and state governments have a legitimate interest in promoting marriage and heterosexual families. *See, e.g., Weber*, 406 U.S. at 175 (recognizing society's right to condemn "irresponsible liaisons beyond the bonds of marriage" and to attach negative consequences to such liaisons, such as illegitimacy for resulting children); *Parham*, 441 U.S. at 353 (plurality opinion of Stewart, J.) ("It is thus neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."); *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring) ("the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, [is] concededly a permissible and legitimate legislative goal"), *See also Beaty v. Truck Ins. Exchange*, 6 Cal. App. 4th 1455, 1460, 8 Cal. Rptr. 2d 593, 596 (1992) ("the state's legitimate interest in promoting marriage . . . is furthered by conferring statutory rights upon married persons which are *not* af-

forded unmarried partners"); *Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516, 527, 213 Cal. Rptr. 410, 417 (1985) ("The State's public policy favoring marriage is promoted by conferring statutory rights upon married persons which are *not* afforded unmarried partners"; "No similar policy favors the maintenance of nonmarital relationships."); Ga. Code § 19-3-6 ("Marriage is encouraged by the law. Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise shall be invalid and void.").[11]

The California Supreme Court has explained part of the reason for the state's strong interest in the marriage relationship:

> [T]he state's interest in promoting the marriage relationship is not based on anachronis-

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[11] A pertinent analogy is the government's "unquestionabl[e]" "strong and legitimate interest in encouraging normal childbirth, an interest honored over the centuries." Maher v. Roe, 432 U.S. 464, 478 (1977). *See also* Harris v. McRae, 448 U.S. 297, 324 (1980) ("It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life."); H.L. v. Matheson, 450 U.S. 398, 419 (1981) (Stewart, J., concurring) (recognizing state's interest "in encouraging childbirth *rather than abortion*"); Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 797 (1986) (White, J., dissenting) ("we have recognized that the States may legitimately adopt a policy of encouraging normal childbirth rather than abortion"). A major difference between the childbirth versus abortion analogy and this case, however, is that abortion is one of the rights that have been said to come within the fundamental right of privacy, while homosexual conduct is not. Thus, governments should logically be even more free to encourage heterosexual marriage and families over homosexual relationships and behavior.

> tic notions of morality. The policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."

Elden v. Sheldon 758 P.2d 582 (Cal. 1988).

2. Special Homosexual Rights Laws Necessarily Undermine the Longstanding Policy and Precedent Favoring Heterosexual Marriage.

However, special homosexual rights laws undermine that policy in favor of heterosexual marriage and family. *E.g., County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993) (county ordinance against discrimination on basis of marital status invalid because inconsistent with public policy of the state to promote the stability of marriage and the family). As the Minnesota Supreme Court explained in *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990):

> There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from [same-sex and opposite-sex cohabiting] relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?

460 N.W.2d at 10 (quoting *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152, 1158 (1990)).

This negative effect on policies favoring marriage, from official recognition of homosexual relationships or conduct, provides a rational basis for Amendment 2's repeal of special homosexual rights laws.

C. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Religious Liberty.

1. Protecting Religious Liberty Is a Compelling State Interest.

As even the Colorado Supreme Court recognized, "ensuring religious freedom is a compelling governmental interest." *Evans v. Romer*, 882 P.2d 1335, 1342 (Colo. 1994) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943)). As such, Colorado's adoption of Amendment 2 to protect religious liberty that would be infringed by special homosexual rights laws satisfies rational-basis review. As will be seen below, special homosexual rights laws do in fact violate religious liberty.

2. Special Homosexual Rights Laws Violate Landlord and Employer Religious Rights.

Statutes and local ordinances in other states similar to ordinances repealed by Amendment 2 have run afoul of the Free Exercise Clause. *See Smith v. Fair Employment and Housing Comm'n*, 30 Cal. Rptr. 2d 395, 25 Cal. App. 4th 327, *review granted and opinion superseded*, 33 Cal. Rptr. 2d 567, 880 P.2d 111 (1994) (state statute prohibiting marital status discrimination in housing violates federal and state free exercise rights of landlord with religious conviction against renting to cohabiting couple (and thereby becoming complicit in the cohabitation));[12] *Attorney General v. Desilets*, 418

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[12]The court in Smith found that the compelling interest test was triggered because the case presented a "hybrid" of free exercise and free speech claims. Even if such a case in Colorado were not a "hybrid" case, the

Mass. 316, 636 N.E.2d 233, 237-38, 239-40 (1994) (same; noting additional burden on religious landlord that "both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of their religion"; also noting that the law of Massachusetts had promoted marriage but not cohabitation).[13] *But see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) *cert. denied* 115 S.Ct. 460 (1994) (declining to apply compelling state interest test to city ordinance's application to religious landlord).[14] *See also* Duncan, 69 Notre Dame L. Rev. at 421-33 (arguing that compelling interest test should be applied even under *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

Thus, Justice Erickson's dissent in the Colorado Supreme Court was correct that "the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest." *Evans*, 882 P.2d at 1363.

3. Special Homosexual Rights Laws Violate Church and Parachurch Organizations' Free Exercise Rights.

As Justice Erickson discussed in his dissent in the Colorado Supreme Court, some of the local special homosexual rights ordinances that were repealed by Amendment 2 infringed on religious organizations' free exercise

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compelling state interest test would apply under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.

[13]The Massachusetts Supreme Judicial Court vacated the trial court's grant of summary judgment for the state and remanded for further factfinding on the balancing of the state's interests against the landlords' free exercise rights.

[14]The California Court of Appeal in Smith considered and rejected the reasoning of the Swanner majority, and agreed instead with the Swanner dissent. 30 Cal. Rptr. 2d at 410 n.15, 25 Cal. App. 4th 327.

rights.

> In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

882 P.2d at 1363. The conflict between these local ordinances and the First Amendment, and the state's consequent legitimate interest in protecting against those conflicts, is all that is necessary to satisfy the rational-basis standard.

D. Amendment 2 Is Rationally Related to the Legitimate State Interest in Protecting Economic Liberty.

1. The General Rule Is Autonomy in Economic Decisions, Such as Employment and Property Rental.

Civil rights laws, reflecting a consensus that discrimination on the basis of race, gender, or religion is wrong, are the exception to the normal "at will" rules that have historically governed employment and landlord-tenant relationships. Professor Duncan summarized the traditional rules:

> We live in a free society, and the general principle is one of free choice. Under this view, entrepreneurs who must meet the payroll and bear the risks of the market are free to manage their businesses and properties without governmental interference. Similarly, each individual, as the exclusive owner of his or her person and labor, has a right to decide where to live and for whom to work.
>
> The traditional rule in employment law mirrors these fundamental principles and establishes a baseline of free choice and autonomy for both employer and employee. Employers are free to hire or fire "at any time and for any reason," and employees are equally free to accept employment or to quit as it may please them. Historically, the law of landlord and tenant was also governed by the principles of choice and autonomy -- landlords and tenants were free to enter into leases (or not) with whomever they chose and on any basis they chose.

69 Notre Dame L. Rev. at 399. (Again, exceptions to these general rules were properly made by civil rights laws for only narrow and strongly justified suspect classes or quasi-suspect classes such as race and gender.) *See also Dolan v. Tigard*, 114 S. Ct. 2309, 2316 (1994) ("the right to exclude others [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"); *Beach*, 113 S. Ct. at 2105 (Stevens, J., concurring) ("A decision *not to regulate* . . . . . is adequately justified by a presumption in favor of freedom.") (emphasis in original).

2. Sexual Morality Is Relevant to Economic Decisions.

The character of a prospective employee or tenant obviously is relevant to the economic decision about to be made by the potential employer or landlord. Certain characteristics, such as race, tell the employer or landlord nothing about the person's character, and are therefore illegal to consider. Sexual behavior, on the other hand, certainly can be revelatory of relevant character qualities.

> Sexual conduct and preferences are fraught with moral and religious significance. To be

> sure, not everyone agrees that homosexual behaviors and inclinations are immoral. But the point is that, unlike race, sexuality is morally controversial. When an employer or landlord makes a distinction based upon a person's sexuality, he is making a judgment about the content of that individual's character.

Duncan, 69 Notre Dame L. Rev. at 403-05.

3. Amendment 2 Protects These Economic Liberties from Restrictions.

By repealing special homosexual rights laws that abrogated the traditional at-will approach to employment and tenancy, Amendment 2 allows employers, employees, landlords, and tenants -- if they choose -- again to consider a factor that to some will be a critical indicator of moral character (and therefore of fitness for the position in question).

III. SPECIAL HOMOSEXUAL RIGHTS LAWS DO CONFER "SPECIAL RIGHTS."

Proponents of special homosexual rights laws contend that the protective legislation they seek does not provide any special rights, but only the same rights anyone else has.[15] That contention begs reality, as Professor Duncan cogently explains:

> Although employers and landlords are prohibited from taking race, gender, and religion into account when selecting employees or tenants, they remain free to make choices on the basis of other, non-protected factors. For example, it is permissible to discriminate in employ-

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[15] *See, e.g.*, Marcosson, The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights, 9 Notre Dame J. L. Ethics and Pub. Pol'y 137 (1995); Note, Constitutional Limits on Anti-Gay-Rights Initiatives, 106 Harv. L. Rev. 1905 (1993).

> ment against members of the Ku Klux Klan and similar hate groups, even if the prospective employees are otherwise well-qualified for the job. Landlords likewise are free to refuse to rent to Klansmen, pornographers, and other persons of undesirable character, even though these prospective tenants have the means to pay rent and good references from previous landlords.
>
> Therefore, when proponents of homosexual rights legislation argue that they are seeking nothing more than the same civil rights everyone else has, they are wrong for two reasons. First, they already have the same rights everyone else has, i.e., the right to be protected against discrimination on the basis of their race, gender, religion, and other protected categories. Second, since the general rule continues to be one of free choice in employment and housing matters, homosexual behavior is merely one of countless activities left unprotected by antidiscrimination laws. As we have seen, even a person's political associations, such as his or her membership in the Ku Klux Klan or other unpopular groups, are not protected activities under typical employment discrimination and fair housing laws. Since political expression and association, activities recognized as fundamental rights by the First Amendment, typically are not protected against private discrimination, the argument for "equal treatment" of homosexual behavior would appear to cut the other way.

69 Notre Dame L. Rev. at 400-401.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court for the State of Colorado should be reversed.

Dated April 21, 1995.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1994

ROY ROMER, Governor of the State of Colorado, and the STATE OF COLORADO

Petitioners,

v.

RICHARD G. EVANS, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF AMICI CURIAE OF OREGON CITIZENS ALLIANCE, NO SPECIAL RIGHTS COMMITTEE and STOP SPECIAL RIGHTS-PAC

IN SUPPORT OF PETITIONERS

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EDITOR'S NOTE

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TABLE OF CONTENTS

	PAGE
CONSENT OF THE PARTIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. NEW FUNDAMENTAL RIGHT	4
B. EFFECT IN OREGON OF THE DECISION IN ROMER V. EVANS	9
Right to control the education of one's own children	11
First Amend Free Speech dangers	13
CONCLUSION	15

INDEX TO APPENDICES

	APPENDIX
Letter of Timothy M. Tymkovich	A
Letter of Jean E. Dubofsky	B
Oregon Ballot Measure 9	C
Oregon Ballot Measure 13	D-1, 2
Newspaper Article, Cottage Grove Sentinel	E
Newspaper Article, Daily Astorian	F-1, 2
Newspaper Articles, Oregon News Leader	G-1, 2

TABLE OF AUTHORITIES

	PAGES
Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed. 2d 140 (1986)	5, 6, 8, 11
City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)	9
Evans v. Romer, 854 P2d 1270 (1993)	4, 5, 6, 9
Evans v. Romer, 882 P2d 1335, 1356 (1994)	4, 5, 9, 13

Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971) 5
Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) 6
Heller v. Doe by Doe, ___US___ 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) 9
Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) 4
James v. Valtierra, 402 U.S. 137, 91 S. Ct. 1331, 28 L.Ed.2d 678 (1971) 6, 7, 8
Meyer v. Nebraska 262 U.S. 390, 43 S. Ct 625, 67 L E. 1042 (1925) 11
Oregon v. Hass, 420 US 714, 95 S Ct 1215, 43 L Ed 2d 570 (1975) 8
Padula v. Webster, 822 F2d 97, 103, (D.C. Cir. 1987) 6, 7
Pierce v. Society of Sisters 268 U.S. 510, 45 S. Ct. 571, 69 L Ed 1070 (1925) 11
Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645 (1944) 11
Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) 4, 5
United States Constitution, Fourteenth Amendment - Equal Protection Clause 5, 7, 8
ORS 659.165 . . . . . 2, 12

CONSENT OF THE PARTIES

Amici Curiae have received the consent of the parties to file this Amicus Brief.

Mr. Timothy M. Tymkovich, Solicitor General of the State of Colorado, Counsel for Petitioners has consented in a letter dated April 6, 1995 (Appendix A).

Jean E. Dubofsky, Counsel for Respondents, has consented in a letter dated March 31, 1995 (Appendix B).

IN THE

Supreme Court of The United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This case arises in the context of ongoing political controversy. The Oregon Citizens' Alliance (OCA) is a non-profit, 501 (c) 4 organization with an approximate donor base of 20,000 households among its financial supporters and volunteers. The No Special Rights Committee, and Stop Special Rights PAC are non-profit, political action committees created under the umbrella of OCA.

Amici Curiae have twice sponsored ballot initiatives to amend Oregon's state constitution similar to Colorodo's Amendment 2 in 1992 and 1994. (Appendices C & D). They have both failed: 56 to 44 percent in 1992 and 51 to 49 percent in 1994. On May 18, 1992, the voters of the City of Springfield, Oregon, passed the first of 26 local measures establishing substantive policy which, like Colorado's

Amendment 2, prohibit their respective local governments from establishing special class status based upon sexual orientation. *Amici Curiae* have organized and promoted twenty city measures and six county measures which the voters have passed.[1] They hope to again sponsor a ballot initiative to amend Oregon's state constitution with a measure similar to Colorado's Amendment 2.

As in Colorado a few Oregon cities (Portland, Corvallis, Ashland and Eugene) have enacted (pro-homosexual) ordinances specifically prohibiting discrimination on the basis of sexual orientation and providing remedies for their violation.

On August 3, 1993, the Oregon State Legislature enacted ORS 659.165, intended to preclude enforcement of the local measures promoted by *amici curiae*, mentioned above.

Amici curiae, have challenged the constitutionality of ORS 659.165,[2] and its attempt to draw a truce in Oregon. On April 12, 1995, the Oregon Court of Appeals upheld its constitutionality; as of this writing, review by the State Supreme Court has not been but may be requested.

In the area of homosexual rights, Americans have deeply held beliefs which have been expressed through the political process. *Amici*

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[1] - The cities in Oregon that enacted municipal legislation similar to Amendment 2, are: Springfield, Cornelius, Junction City, Canby, Cottage Grove, Creswell, Lebanon, Molalla, Estacada, Medford, Sweethome, Oregon City, Oakridge, Keizer, Albany, Roseburg, Turner, Veneta, Grants Pass and Lakeview. The Counties are: Douglas, Josephine, Linn, Klamath, Jackson, and Marion.

[2] - ORS 659.165 provides:

"(1) A political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charger provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.

(2) Any person who believes that a political subdivision has enacted or is enforcing a charter provision, ordinance, resolution or policy in violation of this section may bring an action in circuit court to have the charter provision, ordinance, resolution or policy declared invalid, for injunctive relief and for such other relief as the court may consider appropriate. The court shall aware reasonable attorney fees and costs to a plaintiff who prevails in an action under this subsection.

Curiae are very concerned about the danger to Oregonians' constitutional rights to the use of ballot initiatives, to free religious speech, and to their rights to oversee and control the education of their own children. *Amici Curiae* are concerned that the inappropriate creation of a fundamental right for independently identifiable groups to equally participate in the political process, will not only embroil the federal courts in endless claims of wrongs by innumerable, independently identifiable groups, but will more importantly nullify the right of the people of Oregon and this Nation to decide for themselves, through the political process the issue of homosexual rights and community standards of morality.

Amici Curiae believe that the newly created fundamental right of an independently identifiably group to equally participate in the political process is not supported by the decisions of this Court, and in fact is in direct contradiction to this Court's decisions concerning judicial restraint in the creation of new fundamental rights.

Amici Curiae will share more specifically with the Court their concerns as to how the decision in the present case will affect Oregon. Counsel for *amici curiae* have participated in Oregon state courts on the issue of homosexual rights and the right of the voters to establish substantive policy therein. *Amicus* Oregon Citizens' Alliance believes the expertise of its counsel may be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts set forth in Petitioner's Brief filed with this Court.

SUMMARY OF ARGUMENT

Amici Curiae support Petitioners in their contention that the decision of the Colorado Supreme Court should be reversed.
Amici Curiae contend that a new federal fundamental right has been proclaimed by the Colorado Supreme Court which has no basis in precedent or the principles previously laid down by this Court. As a basis for applying the strict scrutiny standard of review in this constitutional challenge to a state ballot initiative, the new fundamental right granted to 'independently identifiable groups' imperils the very heart

of the right of the people to pass legislation by the initiative process.

Amici Curiae further contend that the Colorado Court's unprecedented classi-fication as a civil rights minority (i.e. 'suspect class') of those who practice homosexuality, lesbianism or bisexuality will, if left to stand, threaten the constitutional rights of free religious speech and the right to control the education of one's own children in Oregon.

ARGUMENT

A. A NEW FUNDAMENTAL RIGHT

This case is about the improper creation of a new fundamental right in conflict with case law and two hundred years of history. The Colorado Supreme Court has unjustifiably created a frankenstein rule of law to achieve a desired end. The substitution of the concept "independently identifiable group" for the traditional "suspect classifications" in equal protection clause analysis endangers and potentially nullifies the peoples' right to legislate by the initiative process, due to the potentially infinite number of such groups: any group backing any ballot initiative could be an "independently identifiable group" and in case of an election loss could logically argue the new measure causes unconstitutional discrimination against them.

Justice Erickson dissenting in Evans v. Romer, 882 P2d 1335, 1356 (1994) (Evans #2), pointed out that the majority in that case had proclaimed this new fundamental right, i.e. the right of an independently identifiable group to participate equally in the political process and applied a strict scrutiny test. The majority reviewed three different types of political participation cases: reapportionment cases, voting restriction cases, and candidate eligibility cases to justify their application of the strict scrutiny standard of review to Amendment 2. They acknowledged that Amendment 2 was clearly distinct from these cases, but then proceeded anyway to formulate a "fundamental right to participate equally in the political process" and apply it. Evans v. Romer, 854 P2d 1270 1278-79 (1993).

To further support its creation of the new fundamental right, the Colorado Supreme Court relied heavily on Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969); Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d

896 (1982); and Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971). Washington v. Seattle involved a ballot initiative which restricted school bussing. In Hunter v. Erickson, an Akron, Ohio, ordinance required a referendum before the provisions of a fair housing ordinance could be applied. In both cases the effect was peculiarly burdensome to racial minorities and it was the racial nature of the issue in defining governmental decision making structure which violated the Equal Protection Clause of the Fourteenth Amendment. Washington v. Seattle School District No. 1, supra, 458 U.S. at 472. Justice Erickson in his dissents to both Evans I and Evans II, specifically noted that it was the racial focus which triggered the application of the Hunter doctrine. Evans v. Romer, 854 P2d 1270, 1299-1300, (1993); Evans v. Romer, 882 P2d 1335, 1357 (1994).

Strict scrutiny and the consequent 'compelling state interest' requirement has heretofore been applied only to the loss of fundamental rights or a law which impacts "suspect classes" of citizens, i.e. members of a particular race, or nationality. The Court below disagreed that the strict scrutiny standard had to be reserved to "suspect classes" but broadened the applicability to "independently identifiable groups." Thus the Colorado Supreme Court has, despite this Court's holding in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 92 L.Ed. 2d 140 (1986) created a new "suspect class" and called it something different, i.e., an "independently identifiable group". Without any real precedent it extended the laws dealing with racial discrimination into new fields.

The Colorado Court found support for its created fundamental right in Gordon v. Lance, supra. That case involved the requirement of a three-fifths majority to pass a bond issue. The contention there was that the Equal Protection Clause was violated because "yes" votes would have a smaller impact than "no" votes. This Court found no constitutional defect noting that no racial group or "independently identifiable group" could be burdened. The Colorado Supreme Court, rather than recognizing the Hunter doctrine to be based on a suspect classification which was racial in nature, chose to opine that

> "the salient aspect of Hunter which distinguishes it from the situation in Gordon was the absence of a group of voters that

> was independently identifiable' apart from the group created by the statute itself." Evans v. Romer, 854 P2d at 1282.

In explaining its interpretation of the Hunter doctrine, the Colorado Supreme Court acknowledged this Court's decision in James v. Valtierra, 402 U.S. 137, 91 S. Ct. 1331, 28 L.Ed.2d 678 (1971) which again emphasized the racial factor of Hunter. The statute challenged in James (referred to as Article XXXIV) required voter approval via a local referendum for low-rent housing projects. In reconciling James it reasoned that James

> "is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on Hunter." Id. at note 21.

If this reasoning is correct, are not the poor an "independently identifiable group?" Are not people over the age of 70 years old an "independently identifiable group?" (See Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). In fact, without established parameters, the numbers are limitless for independently identifiable groups.

This Court has previously held in Bowers v. Hardwick, supra, that the right to privacy does not extend to all kinds of sexual conduct between consenting adults. 478 U.S. at 186. In addition, this Court went on to hold "that a right to engage in consensual sodomy is not constitutionally protected as a fundamental right since it is neither 'implicit in the concept of ordered liberty,' nor 'deeply rooted in this Nation's history and tradition.'" Padula v. Webster, 822 F2d 97, 103, (D.C. Cir 1987), citing Bowers. Rather, this Court acknowledged that "[p]roscriptions against that conduct have ancient roots." 478 U.S. at 192. And, in fact, this Court refused to invalidate the many state laws which still criminalize this behavior. 478 U.S. at 196. Based upon this holding, this Court applied the rational basis test to it's review of the Georgia criminal sodomy statute at issue in that case and then determined that the presumed beliefs of the Georgia electorate that sodomy is immoral was sufficient to pass it. The District of Columbia Circuit stated:

> "It would be quite anomalous, on its face, to declare status

> defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. * * * If the Court was unwilling to object to state laws that criminalize behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal" Padula v. Webster, supra, 822 F2d at 103. (emphasis added)

If Colorado had simply criminalized homosexual conduct there could be no discussion as to whether persons who practice that conduct may be a minority or "suspect classification" under the Equal Protection clause. How can they become such a minority class simply because Colorado has not criminalized their conduct?

The purpose of Amendment 2 was undoub-tedly to protect and preserve traditional family values. It accomplishes this purpose in a very humane and progressive, and yet firm, but noncriminal, manner. It does not interfere with the rights of privacy of any homosexuals or any other group. It does not prohibit anyone from hiring or renting to homosexuals, but it also, does not prohibit anyone from refusing to hire or rent to homosexuals on moral grounds. It simply prevents the government from granting specially pro-tected or minority status to homosexuals or prohibiting morally derived discrimination against homosexual conduct. The fact that the method chosen was not criminal, should not render Amendment 2 illegal. The people of some states may believe that criminal prosecution is the best method to accomplish such purposes. That is their right and would be a proper exercise of the police power and would be, perhaps, a more efficient approach, but it is not the way that was chosen by the people of Colorado and it should not be the only way. Simply put, persons practicing homosexuality are not and should not be considered a 'suspect class' or anything equivalent for purposes of the equal protection clause.

In considering this Court's decision in James v. Valtierra, supra, *Amici Curiae* submit that the Colorado Supreme Court missed the clea- acknowledgment of the importance of the racial nature of the holding in Hunter:

> "The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing 'special burdens on racial minorities within the governmental process.'" James v. Valtierra, 402 U.S. at 140. (emphasis added)

In James this Court squarely had an opportunity to establish a fundamental right based upon an independently identifiable group to participate in the political process, but it did not, stating:

> "They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." James v. Valtierra, 402 U.S. at 142.

Amici curiae submit that this Court has never held that such a fundamental right exists. Rather, as this Court stated in Bowers:

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. * * * There should be therefore great resistance to expanding the substantive reach of the [equal protection clause of the Fourteenth Amendment] particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." Bowers v. Hardwick, supra, 478 U.S. at 194.

Under Oregon v. Hass, 420 US 714, 719, 95 S Ct 1215, 1219, 43 L Ed 2d 570 (1975) a state court cannot impose a rule of federal constitutional law that the Supreme Court has specifically refrained from adopting. *Amici Curiae* submit that the Colorado Supreme Court has erred in so doing.

The standard that should have been applied was the rational basis test rather than the strict scrutiny test. Concerning the rational basis test the Court explained in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985):

> "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."

The rational basis test should be used unless the classification involves fundamental rights or a "suspect class." Under the rational basis test a statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. A classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Courts do not have a license to judge the wisdom, fairness, or logic of legislative choices. Heller v. Doe by Doe, ___US___ 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993).

B. EFFECT IN OREGON OF THE DECISION IN ROMER V. EVANS

As already mentioned, the decision of the Colorado Court, Evans v. Romer, 882 P2d 1335 (1994) would seriously affect the viability of the ballot initiative process in Oregon if it were the law of the land. The Colorado Supreme Court realized that homosexuals do not constitute a suspect class of citizens as has up to now been required for the strict scrutiny test. So the court called them an "independently identifiable group." Evans v. Romer, 854 P2d 1270, 1283-84. If that should be the new standard there are doubtless many more easily "independently identifiable groups", e.g. all people who have been convicted and sentenced to the penitentiary (they have no right to vote in Oregon), all prostitutes, all smokers, or even -- all people whose last names begin with the letter "A". There are undoubtedly myriads of independently identifiable groups. But how does the body politic or anyone for that matter identify a homosexual or one who is so oriented? That is possible only if that person says so. A person can therefore move into or out of this independently identifiable group

whenever it is to his or her advantage. And if the homosexual activists were to succeed in removing from our culture all moral stigma attached to homosexuality they could even more easily move in and out of the "identifiable group."

If homosexuals, lesbians and bisexuals are an independently identifiable group, then certainly the voters who voted in favor of Ballot Amendment 2 were also. Perhaps they could alternatively be identified as people who are straight or people who are committed to heterosexual marriages or stable families or Biblical standards of morality. What has happened in this case is that the Colorado Supreme Court has removed the rights to equally participate in the political process from the majority of the voters in Colorado. They took a political victory from one independently identifiable group and gave it to another identifiable group--those who practice homosexuality, lesbianism or bisexuality. One or the other of these identifiable groups was bound to lose this contest. The Court's reasoning could probably be adapted to reverse the result of any election contest--be it for a ballot measure or a candidate for office.

Amici Curiae here submit that no group in fact lost a right to participate equally in the political process by virtue of Colorado's 1992 election. The opponents of Amendment 2 did and still do have the same identical right to place their own initiative on the ballot just as the proponents did. They have the right to vote. Before the Colorado Court's decision all of the political processes were still open to all. Laws could still be added, modified or repealed by either the legislature or by a direct vote through the initiative process. However the Colorado Court's decision certainly has undermined the right to participate equally in the political process by groups who would use ballot initiatives by the applicability of its reasoning to aid the loser in this political contest. Any losing group could be an independently identifiable group.

The decision of the Colorado Supreme Court in this case is a serious blow to the use of the initiative process in Oregon as it certainly must be in Colorado.

In Oregon the controversy continues over the addition of homosexuals or sexual orientation to the list of protected classes in the

state's civil rights laws. As previously noted *amicus* Oregon Citizen's Alliance (OCA) has twice backed an initiative petition to put a measure similar to Colorado's measure 2 on Oregon's ballot.

OCA hopes to again place such a measure on the ballot. Concerns also include the trampling of the constitutional rights of conservative Christian citizens at the hands of gay activists. Specifically these rights are (1) parents' rights to control the education of their children, and (2) stifling of free expression of religious speech.

One of OCA's prime objectives will be to ensure the right of families to control the education of their children and not have them exposed to or forced to accept the indoctrination of gay activists.

OCA agrees wholeheartedly with former Chief Justice Burger's statement that "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Bowers v. Hardwick, 478 U.S. 186, 197, 106 S.Ct. 2841, 2847, 92 L.Ed. 2d 140 (1986).

Right to control the education of one's own children.

The Supreme Court has on several occasions recognized the right of parents to control the education of their own children. Pierce v. Society of Sisters 268 U.S. 510, 45 S. Ct. 571, 69 L Ed 1070 (1925), Meyer v. Nebraska 262 U.S. 390, 43 S. Ct 625, 67 L E. 1042 (1925); Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

Oregon parents are presently witnessing the subjection of their children in the public schools to indoctrination into the viewpoint of gay activists, specifically that homosexual conduct is to be accepted as a normal and acceptable lifestyle choice. This is frequently done without the parents consent, against the religious and cultural beliefs of the parents and often in secrecy without their knowledge.

Recently an Oregon small town newspaper, the Cottage Grove Sentinel ran an article concerning the upset local parents were feeling when the local Head Start program proposed to include a book or books on homosexual families for pre-schoolers. (See Appendix E).

In October 1992 parents of seventh graders in Astoria, Oregon,

were dismayed to learn their children had been taken on a field trip and given a pro-homosexual presentation included with an anti-drug use skit; the parents were told only that the field trip would deal with anti-drug use education. (Appendix F).

In May 1994, 135 eighth grade boys from Five Oaks Middle School in Beaverton, Oregon (a Portland suburb) were taken to a seminar off campus to promote abstinence and personal responsibility. While there one of the speakers told the boys to have at least two homosexual experiences to know if they are gay or straight. Parents were outraged. The school district then hired a lawyer who had been active in the campaign against OCA's ballot measures to investigate the matter. To the parents this was like hiring the fox to guard the chickens. He minimized the matter by saying that the boys had misunderstood the speaker. (Appendix G).

In an effort to head off the rights of conservative citizens to pass local initiatives concerning homosexuality the 1993 Oregon legislature passed ORS 659.165 (HB 3500) pre-empting and barring enforcement of such measures. *Amici Curiae* made an unsuccessful challenge to the constitutionality of that statute, as previously mentioned. One of the reasons given by the legislature and by the pro-gay forces for this statute was to end the piecemeal, community-by-community pattern of the law on the subject of protected status for those who practice homosexuality, and mandate a statewide policy on the subject. Interestingly this was an argument advanced in favor of Colorado's Amendment 2 to which the Colorado Supreme Court gave no weight.

With the passage of ORS 659.165 the only alternative left to parents such as those mentioned above in Cottage Grove, Astoria, Beaverton or elsewhere is a state constitutional amendment that would prohibit such material from being presented to public school children. The overturning of Colorado's measure 2 could effectively leave them with no recourse whatsoever other than pay tuition in addition to school taxes to put their children in private school. Some mechanism must be in place to allow conservative and/or Christian parents to effectively control the education of their children and shield them from this type of indoctrination if they feel they need to.

First Amendment Free Speech dangers.

For the past several legislative sessions (Oregon's legislature meets for approximately 6 to 8 months every second year) gay activists have introduced bills that would add 'sexual orientation' to the list of minority classifications in the state's civil rights laws.[3] The current version of such a bill is HB 2670. One of its provisions would make an unlawful employment practice "(g) For any person, whether an employer or an employee, to aid, abet, incite compel or coerce the doing of any of the acts forbidden * * * " The forbidden acts include an employer's refusal to hire or employ or to bar or discharge from employment or discriminate in compensation, terms, conditions, or privileges of employment because of a person's "race, religion, * * * sexual orientation * * *". In case someone feels he or she is the victim of such discrimination he is given a cause of action to sue the violator in court.

This bill (HB 2670) is fairly typical of the bills in previous legislatures, though previous bills have also been applicable to places of public accommodation, residential rentals and real estate sales. To date none of these bills have passed, but they illustrate what will come when the governorship, and both houses of the legislature are controlled by friends of the gay activists.

The reduction in freedom of speech arises with the possibility to sue conservative Christians for allegedly "aiding or abetting" discrimination if they should say that homosexuality is wrong or is a sin. This is currently possible under the special ordinances in Portland and Corvallis mentioned above. It could be applied statewide if one of the legislative bills presented by the gay activists should be passed. For the large percentage of conservative Christian citizens sin is a central concept of their religion and homosexual conduct or any sexual conduct outside of heterosexual marriage is very definitely a sin and is wrong. Freedom to say so is extremely important to them, as is the right to attempt to persuade others to their viewpoint. Even the Colorado Supreme court recognized the right of parents to teach their children that homosexuality is wrong. Evans v. Romer, 882 P2d 1335,

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[3] - For example: SB 34 in the 1993 legislature; SB 708 in the 1991 legislature; HB 2325 in the 1987 legislature.

1344 (1994).

As shown above there is no question but what the aiding and abetting clauses would diminish freedom of religious speech. The only safeguard for Oregonians is an Amendment 2 style ballot initiative. A decision affirming the decision of the Colorodo Supreme Court to nullify Amendment 2 would thus have the eventual effect of diminishing the freedom to even say that homosexuality is a sin.

The reasoning of the Colorado Supreme Court rides rough shod over the sensibilities of nearly half the population of both Colorado and Oregon where this issue has been before the voters.

CONCLUSION

For the reasons set forth above, the Supreme Court should reverse the decision of the Colorado Supreme Court.

Respectfully Submitted,

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Note:
Appendices E through G have been submitted as a lodging in full-size, unreduced format and are available in the Office of the Clerk of the U.S. Supreme Court.

Appendix A

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Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

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April 6, 1995

William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

RE: Roy Romer, Governor of Colorado, et al. v. Richard G. Evans, et al., No. 94-1039

Dear Mr. Suter:

Larry Hall on behalf of the Oregon Citizens Alliance (OCA) intends to file an amicus brief in support of the State of Colorado's petition for a writ of certiorari in the United States Supreme Court. As attorney for the State of Colorado, by copy of this letter, I consent to OCA's decision to file a brief in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,

Timothy M. Tymkovich
Solicitor General

TMT:pac
Enclosure (certificate of mailing)
cc: Larry Hall
c/o Oregon Citizens Alliance

Appendix B

Law Office of
Jean E. Dubofsky, P.C.
Canyon Center Building
1881 Ninth Street, Suite 210
Boulder, Colorado 80302

Telephone (303) 447-3510 Fax (303) 447-2801

March 31, 1995

Lawrence J. Hall
Attorney at Law
P.O. Box 785
Silverton, OR 97381

Re: Romer v. Evans, U.S. Supreme Court No. 94-1039

Dear Mr. Hall:

Pursuant to Supreme Court Rule 37.2, the respondents consent to your request to file an amicus curiae brief in support of the petitioners in the above-referenced case.

Sincerely,

Jean E. Dubofsky
Counsel for Respondents

JED/kb

APPENDIX C

Oregon Ballot Measure 9 (1992)

"Be it Enacted by the People of the State of Oregon:

Paragraph 1. The Constitution of the State of Oregon is amended by creating a new section to be added to an made a part of Article 1 and to read:

Section 41 (1) This state shall not recognize any categorical provision such as "sexual orientation," "sexual preference," and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

APPENDIX D-1

Oregon Ballot Measure 13, (1994)

Be it Enacted by the People of the State of Oregon:

The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article !. The new section shall be known as "The Minority Status and Child Protection Act" and will reaD AS FOLLOWS:

Section 41: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.

(1) In the State of Oregon, including all political subdivisions and government units, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.

(2) Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit in the State of Oregon that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality.

(a) The state of Oregon, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits on the basis of homosexuality.

APPENDIX D-2

(b) The State of Oregon, political subdivisions and all units of state and local government, with regard to public employees, shall generally consider private lawful sexual behaviors as non-job related factors, provided such factors do not disrupt the work place and that such consideration does not violate subsections (1) and (2).

(c) Though subsection (1) and (2) are established and in effect, no unit of state or local government shall deny to private persons business licenses, permits or services otherwise due under existing statutes; nor deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Oregon or the Constitution of the United States of America.

(d) Though subsection (1) and (2) are established and in effect, this section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.

(3) The PEOPLE INTEND, that if any part of this enactment be found unconstitutional, the remaining parts shall be held in full force and effect. This Section shall be in all parts self-executing.

Cottage Grove Sentinel

...r 29 Cottage Grove, Oregon, Wednesday, February 23, 1994 34 Pages, ...

Preschool parents stunned by proposed book list

JODY ROLNICK
Sentinel News Editor

David Owen describes himself as a supporter of liberal causes.

But the former California environmentalist has taken issue with a letter left to him by his 5-year-old son's Head Start liaison.

The missive alerts parents to a meeting next Monday to review a list of books which include the topic of homosexual families.

O Publisher O suggests subject too heavy for little kids, page 4A.

"My reaction was one initially of outrage that they could even think about this," Owen said.

Colleen Stewart, education coordinator for Lane County's Head Start headquarters in Springfield, said that the book list was not meant to offend anyone.

"We're not intending to discuss homosexuality," she said. "It's about acceptance of different families."

On the list are seven categories of books about families. The reading material ranges from single-parented and step-parented families to families of color and accepted differences.

Teachers at Head Start's 12 sites were asked to choose the top three or four titles in each area for parents to review. Then, after several meetings and discussions, the books were to be left in Head Start site libraries.

The books are part of a larger move toward an anti-bias curriculum that Head Start employees are implementing. From NAEYC

"Our goal is to make sure each child feels good about who he or she is. We don't judge people's religion, job, or family; we respect everyone's different ways to live," says a Head Start notice to teachers.

So the idea of including books that mention gay or lesbian parented families is just an extension of letting kids know that all families are accepted, Stewart said.

But Owen believes that the subject is too politically charged and too advanced for preschoolers.

He said he laughed when the Oregon Citizens Alliance, in its attempt to curtail gay rights during a statewide initiative in 1992, said that schools want to teach that homosexuality is an accepted form of behavior. The conservative political group mentioned several of the titles on the Head Start list.

"I figured that this would never happen here. That they were talking about something that was happening in New York City, not in our town," Owen said.

Stewart said the books are not necessarily intended to spark discussion about gays and lesbians. Rather, the reading material just presents families in all of their various forms.

Teachers will be trained on how to deal with questions, but will not discuss homosexuality with the children, Stewart said. "That's not appropriate for 4-year-olds," she said.

Stewart said the book list has caused some discussion in some of the 12 communities where Head Start has facilities, but mostly, she said, parents don't have a problem with it.

Discussion over concerns is welcome, Stewart said, especially at Monday's 1 p.m. meeting for parents. Dialogue over the books will probably spill out over the course of a few weeks.

Head Start is a federally-funded program for pre-school age children of low income families.

There are nearly 60 children in Cottage Grove served by Head Start.

Appendix E

Appendix F-1

THE DAILY ASTORIAN
THURSDAY, OCTOBER 22, 1992
119th YEAR, No. 81

Performing group stands by its skits

Leader says parents should have been better informed about controversial field trip

By SELINA DANKO
Of The Daily Astorian

Members of a touring youth group, whose recent appearance in Astoria has drawn the ire of some parents of Lewis and Clark and Warrenton Grade school seventh-graders, are not apologizing for their controversial performance.

"I didn't find any of it objectionable," said Theresa Russo, who is the director of education and training for Planned Parenthood in Portland and works with the Performance group known as Teens and Company. "I personally think it's very tastefully done and the audience seemed to enjoy it," she said.

Russo added that she was sorry the parents of the area seventh-graders attending the performance were not better informed about the content of the field trip.

Some parents are angry about the field trip at the Astoria Masonic Temple attended by about 130 seventh graders from the two schools because they feel they should have been better informed about the material scheduled to be presented to their children.

The Teens and Company group was invited by Robin Andrea, who coordinates anti-drug use counseling for the Astoria public schools to entertain and inform the seventh-graders with a series of skits dealing with issues ranging from eating disorders and birth control to homophobia.

Andrea apologized for not reviewing the material scheduled for the daylong field trip and not providing the parents with more information. He said he received a list of synopses for Teens and Company of the various skits they were going to perform and failed to review them properly. "I read through it and some things didn't register. I didn't preview it nearly well enough."

Jackie Riekkola, whose son Dylan attended the field trip with his Lewis and Clark classmates, is one of those parents angry about the way the field trip was presented. She feels the permission slip sent home to parents

See Field Trip, Page 10

Appendix F-2

Field trip: Parents want action from school board

Continued from Page 1

describing the field trip as a drug and alcohol prevention program was not adequate. She said she especially objects to two homophobia skits and others that she felt were too sexually explicit for the seventh-graders.

"When I read it (the permission slip) I thought they were referring to the use of alcohol and drugs," Reikkola said.

ADMINISTRATORS IN both schools have promised to review their policies and make sure the proper procedures are followed in the future. But Riekkola isn't happy with the way the matter has been handled so far. She thinks administrators knew more about the field trip before it happened than they are letting on.

Riekkola thinks that while the responsibility is being dumped on Andrea, the blame is far more wide-reaching. She said a group of concerned parents were asking for an emergency meeting of the Astoria School Board and are sending complaint letters asking administrators to look into violations of school policy.

"I thank God for the people like the concerned teacher that is helping us through this from an inside point of view. The public eye is on them and if they don't do something I don't know what we'll do," she said.

Bernard LaCosse, Warrenton school superintendent, said that staff will be discussing the field trip with seventh-graders in Warrenton today. He denied having any previous knowledge of the material presented to them by Teens and Company other than that it was a drug and alcohol prevention program.

The field trip comes as Oregon voters prepare to vote on controversial Ballot Measure 9, the anti-gay rights measure that would prevent school and other government entities from encouraging or facilitating homosexuality.

Public schools would be required to teach that homosexuality is wrong. The measure, sponsored by the conservative Oregon Citizens Alliance, would amend the Oregon constitution to declare homosexuality abnormal, wrong, unnatural and perverse along with such behaviors as pedophilia and sadomasochism. It would outlaw special privileges for homosexuals.

Andrea said in defense of the program that all of the issues presented in the series of skits performed by the visiting group made up of about a dozen Portland high school students, relate to drug use.

MARGARET FRIMOTH, A state-recognized counselor for sexually abused children and women in Astoria, said she thought the Teens and Company presentation was appropriate

Because of societal pressures, homosexual youth are more apt to become involved in drugs and alcohol and to commit suicide than heterosexual children, she said. For that reason, drug and alcohol prevention programs should address sexual orientation, she said. Anyone on the cutting edge of teen drug and alcohol counseling knows that, she said.

The seventh graders spent the morning of Oct. 13, the day of the field trip, coming up with ideas for positive activities for teens that are alcohol and drug free, according to Andrea. The group then watched a film about choices and consequences in dealing with alcohol and drugs, Andrea said.

The Teens and Company skits were performed after a lunch intermission.

Page 2A
August 1994
Oregon News-Leader

Firm hired to investigate Five Oaks

The Beaverton School District, apparently hoping to head off potential lawsuits from angry parents, has hired the Portland law firm of Miller and Nash to investigate allegations that former Five Oaks teacher, Larry Smith, encouraged students to experiment with homosexuality.

This is just the latest development in a long and emotional conflict between school officials and the parents of a group of eighth grade boys who attended a May 10th seminar in which Smith was an instructor. Students allege that Smith told the boys to "have at least two homosexual experiences" to help them determine their sexual orientation. This alleged comment was made following the presentation of a film called "Stale Roles and Tight Buns," which discussed topics such as male stereotypes and the use of phallic symbols in advertising.

The Miller and Nash investigation begins amidst a new flurry of interest in the affair by community leaders on both sides of the "gay-rights" issue. Openly homosexual State Representative, George Eighmey, waded into the controversy recently with a letter on official stationary defending Smith and chastising school and health officials for too quickly apologizing to parents. The letter also challenged assertions made in an Oregon Citizens Alliance distributed document called the Five Oaks Fact Sheet, specifically a claim that Smith had been reprimanded for similar actions by school officials on other occasions. Eighmey sent copies of the letter to the media.

In response, OCA State Membership Director, Scott Lively, who had compiled the Fact Sheet, sent his own letter to Eighmey and the media. Lively's letter defended the claim, citing public records of at least one prior incident in which Smith had been reprimanded for distributing invitations to a homosexual youth conference to Five Oaks students. Lively challenged Eighmey to support a call for an independent investigation of the incident by someone with no ties to either OCA or the homosexual community. It is not known whether this letter prompted the hiring of Miller and Nash by the school district.

page 9A

Five Oaks: How it began

Guest opinion by S. Lively

The other night I attended a meeting at Five Oaks Middle School in Beaverton to watch a video called "Stale Roles and Tight Buns." The meeting was arranged by parents at Five Oaks to see what their children had been exposed to at a seminar sponsored by the Washington County Department of Health and Human Services. At the May 10th seminar (billed to parents as a program promoting sexual abstinence), a number of eighth grade boys were shown this video and then allegedly advised by teacher, Larry Smith, to have at least two same sex experiences so they could know if they were "gay." Students also claim Smith advised the boys on selecting lubricants for condoms.

Ostensibly concerned with challenging "stereotypes" of men in advertising, the video denigrated traditional male roles. Much worse, however, was a section about "male bodies" in ads. A number of sensual images of men were shown as the narrator told the viewer to focus on their genitals. The narrator used immature and inappropriate humor, ending the segment with the admonition to "keep looking out for those 'third legs.'" A suggested lack of intimacy among men was attributed to a "homophobic" fear of being perceived as "gay."

After the video, a boy who had attended the seminar stood up in the meeting and testified that Smith had indeed encouraged the boys to experiment with homosexuality. He contested the statement by officials that this was an innocent response to student questions, insisting that Smith's comments were totally unsolicited. According to the young man, Smith gave some of the boys his name and phone number on slips of paper.

When this story hit the news in Portland it undoubtedly shocked many people who had previously refused to believe OCA about the promotion of homosexuality in the schools. The fact is, however, that the Oregon Health Department is fully committed to furthering the homosexual agenda in the public schools. In 1992, under Claudia Webster, the Department co-sponsored a conference for educators which featured Project 10 Founder, Virginia Uribe. Project 10 promotes the discredited notion that 10% of students are homosexual and refers gender confused students to outside "counselors" for help in exploring their sexuality. Uribe told educators "Get your stuff going before you ask permission. It's better to say 'I'm sorry' than 'may I.'" It was no surprise to me when another parent reported that Claudia Webster had admitted to collaborating on the Five Oaks project with Smith as a county-wide pilot.

While the situation at Five Oaks is far from resolved, the fact that parents have organized leads me to believe that it will be brought to its proper conclusion. But the fact remains that there are many teachers and administrators in Oregon with the same political objectives as Webster and Smith. They want affirmation of homosexuality to our kids and they are following Virginia Uribe's advice to get their "stuff" in without asking permission.

Whether or not they get away with it is up to us.

Oregon News Leader, Sept. 1994

Five Oaks investigation clears District, Smith

by Davis Dyer for the *Oregon News-Leader*

Hoping to put to rest the controversy raging for four months, two attorneys have issued their findings to the Beaverton School District regarding allegations of homosexual promotion at Five Oaks Middle School. At the heart of the investigation was the showing of a video tape program, "Stale Roles and Tight Buns" and subsequent discussion by Larry Smith in a workshop dealing with male stereotypes in modern society. Smith is a District teacher who was on sabbatical with Oregon Department of Health last year. Several students and their parents alleged that Smith encouraged the eighth grade boys to have at least two homosexual experiences in order to determine their sexual orientation.

Last month we reported that the School District had hired the Portland law firm of Miller, Nash, et al, to investigate the charges and report their conclusions and recommendations for further action.

In their report, attorneys Clifford N. Carlson, Jr. and Bruce L. Campbell fairly exonerated the District, school, outside agencies, and Larry Smith of any wrongdoing. Their conclusion: blame it on the kids.

In a copy of their "Confidential Report" to District Superintendent Dr. Yvonne Katz obtained by the *News-Leader*, Carlson and Campbell place the fault squarely on the shoulders of those students and their parents who are complaining the loudest.

While admitting that Smith did go "well beyond the scope of his topic," they conclude that the students "misconstrued" Smith's statements because "(1) the comments involved a controversial subject, (2) Mr. Smith has no classroom experience in teaching human sexuality, and (3) the students were unruly and not paying close attention to the presenters."

Carlson and Campbell interviewed "approximately 25 Five Oaks students who attended the workshop, together with their parents," teachers, county officials, and District administrators who had any part in putting on the workshop, and Larry Smith.

Please see Report, p. 9A

Report

Continued from 1A

They also reviewed written District policy statements, teaching materials from the workshop, and material handed out to the students.

The report stated that the District clearly informed both the county health department and Community Youth Services regarding the District's abstinence-based curriculum. Workshop planners knew that "condom use, homosexuality, abortion, and HIV/AIDS would not be appropriate topics for the workshop."

Decisions the District made regarding logistics, however, "combined to create a chaotic atmosphere that helped to facilitate the problems that occurred at the workshop." Allowing more students to attend the workshop than had been planned, sending too few staff to supervise and control them, and holding the workshop off-campus were suspect.

The county agencies were criticized for not telling the District that Smith would be participating. They also neglected to "instruct Mr. Smith to abide by the School District's guidelines for human sexuality education." Because Smith had been a teacher with the District, they "assumed that Mr. Smith was fully aware" of the District's policies.

The students, however, received the greatest blame. "[M]any of the students at the workshop behaved inappropriately." From the very first keynote address and through all of the sessions, the students' behavior was "unruly," "rude," and at times bad enough to force presenters to stop and remove students from the room.

"On several occasions, the students baited and challenged the presenters by asking inappropriate questions or by making rude comments."

Although the report is straightforward in its criticism of Smith's actions, on the crucial matter — encouraging the students to have at least two homosexual experiences to determine if one is homosexual — it completely absolves him.

"Although Mr. Smith's portion of the workshop was intended to address only the stereotyping of male roles in advertising, it is clear that Mr. Smith spent a significant portion of all three of his sessions discussing homosexuality, condoms, and AIDS.

Contrary to Smith's earlier assertions that the topics were raised by the students, the report reveals that he intended to discuss them all along. "Nearly all the students we interviewed stated that Mr. Smith raised the topics." Also, his "placement of several AIDS posters throughout the conference room shows that he intended to discuss AIDS during his sessions." Finally, that he "made similar comments in all three sessions suggests that he had intended to discuss these topics without prompting from the students."

On the central allegation the report states firmly, "Mr. Smith *did not* encourage the students to have homosexual or heterosexual experiences." Instead, according to "Mr. Smith and several students, Mr. Smith said that if a person has two homosexual experiences, it does not necessarily mean that he or she is gay."

The credibility of the assertions by both students and parents is questioned by the report. Even though veiled, connections to the OCA were strong. "Too strong to be ignored, says Lon Mabon, chairman of the OCA. "Carlson is heading up efforts against Measure 13 . This simply goes to show how politically motivated this report is."

"Nearly all the students," the report states, "who claimed that Mr. Smith had encouraged them to have sexual encounters were the sons of parents who have objections to human sexuality education in the School District. Some of the parents stated that this incident is yet another example of the School District's promoting homosexuality.... Several other parents objected to having homosexuals as teachers in the public schools."

Smith was cleared primarily because he "appears to be devoted to the cause of eradicating HIV and AIDS." The report concludes that "it is unlikely that Mr. Smith would be so irresponsible as to urge the students to have sexual encounters."

Smith will not be teaching at Five Oaks School this year. The District reassigned him to Conestoga School, another middle school in the District.

Report's author chairs anti-13 campaign

by Davis Dyer for the *GN-L*

Clifford Carlson, one of the authors of the report clearing the principals, particularly Larry Smith, in the Five Oaks controversy, is chairman of the No on 13 Board of Trustees. Carlson is a partner with the Miller, Nash law firm in Portland. The firm was hired by the Beaverton School District to conduct an investigation into the controversy swirling about a workshop presented to eighth grade boys at Five Oaks Middle School last May.

In what may present a clear conflict of interest, or at least taint his objectivity, Carlson has been leading up the opposition to Measure 13 since the time OCA began circulating petitions to get it on the ballot.

In a flier under "No on 13" letterhead, Carlson is listed, along with Rep. Gail Shibley, Oregon's first openly homosexual (lesbian) legislator, as one of the board of trustees.

In describing the background of the measure, the flier identifies the OCA as "a far-right political group" seeking to "amend the Oregon Constitution to restrict the individual rights of gay and lesbian persons living in our state."

In a memorandum dated August 22, 1994 sent to "LAWYERS AGAINST BALLOT MEASURE 13" from Carlson and others, he identifies himself as "Chair of No on 13 Board of Trustees." The memo was sent to law offices throughout the Portland Metro area to solicit names to be used in advertisements and money for the campaign.

As to the report to the Beaverton School District, Mabon says, "Carlson obviously knows that the OCA has been using, and will continue to use, the Five Oaks incident in our campaign for Measure 13." He adds, "For him to author this report, essentially whitewashing the whole Five Oaks affair, only to smear the characters of the parents and students who revealed what went on, smacks of political opportunism of the worst kind."

Counsel of Record for the
National Bar Association
in Support of [illegible]

May 26, 1995

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QUESTIONS PRESENTED

Whether a popularly enacted state constitutional amendment that bars all levels and branches of state government from remedying discrimination on the basis of homosexual or bisexual orientation is constitutionally invalid where the amendment is motivated by irrational fear and hatred of a politically unpopular and independently identifiable group.

Whether a popularly enacted state constitutional amendment that bars all levels and branches of state government from enacting or enforcing laws prohibiting discrimination on the basis of homosexual or bisexual orientation violates a privilege or immunity of United States citizens under the Fourteenth Amendment by rendering futile the opportunity to peaceably assemble and to petition government.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

CONSENT OF THE PARTIES 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

AMENDMENT 2 FAILS UNDER RATIONAL BASIS REVIEW BECAUSE ITS ACTUAL PURPOSE IS TO TARGET FOR HARM HOMOSEXUAL CITIZENS BY EMPOWERING, AND IMPERMISSIBLY INVOLVING THE STATE IN, PRIVATE DISCRIMINATION. 4

A. Amendment 2 Fails Under Rational Basis Review Because the Actual Purpose of the Amendment is to Target for Harm Homosexual Citizens. 5

B. Amendment 2 Significantly Encourages and Involves the State in Private Discriminations, an Impermissible Means of Advancing Any Governmental Interest. 8

AMENDMENT 2 SHOULD BE REVIEWED UNDER HEIGHTENED SCRUTINY BECAUSE IT IMPINGES ON THE FUNDAMENTAL RIGHT OF EQUAL PARTICIPATION IN THE POLITICAL PROCESS. 10

A. Amendment 2 Impinges on the Fundamental Right of Equal Participation in the Political Process and is Therefore Subject to Strict Scrutiny Review. 11

B. Amendment 2 Serves No Legitimate State Interest in Advancing Free Exercise of Religion and Creates an Establishment of Religion. 15

AMENDMENT 2 DEPRIVES HOMOSEXUAL CITIZENS OF THE PRIVILEGES OR IMMUNITIES UNDER THE FOURTEENTH AMENDMENT TO PEACEABLY ASSEMBLE AND PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES. 19

AMENDMENT 2 VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL. 22

AMENDMENT 2 IMPINGES ON FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION. 25

THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE SEVERAL STATES TO ABROGATE THE FUNDAMENTAL RIGHTS OF STATE CITIZENS. 29

CONCLUSION. 30

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Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) 3, 18, 19

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Buckley v. Valeo, 424 U.S. 1 (1976) 25, 27

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Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) . 2, 9

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Dunn v. Blumstein, 405 U.S. 330 (1972) 22

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Gregory v. Ashcroft, 501 U.S. 452 (1991) 29, 30

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James v. Valtierra, 402 U.S. 137 (1971) 13

Kramer v. Union School Free Sch. Dist., 395 U.S. 621 (1969) . 10

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Meyer v. Grant, 486 U.S. 414 (1988) 26

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Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586 (1940) 16

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Reitman v. Mulkey, 387 U.S. 369 (1967) 2, 8, 29

Reynolds v. Sims, 377 U.S. 533 (1964) 3, 11, 13

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Twining v. New Jersey, 211 U.S. 78 (1908) 4, 22

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STATEMENT OF CASE

Amicus adopts the statement of the case as presented by Respondent.

CONSENT OF THE PARTIES

Petitioners and Respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The National Bar Association ("NBA"), founded in 1925, is an organization comprised of over over 20,000 lawyers --- most of whom are African American --- located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, societal and economic welfare of African Americans and other socially and economically disadvantaged Americans.

Amicus understands all too well the issues associated with this case and the old arguments on the capacity of self-government to secure rights for African Americans. *Amicus* believes that it is in its interest to side with Respondents in this case because Petitioners' argument that the expansion of rights leads to a meaningless self-government endangers discrete groups in the population. Such arguments leave disadvantaged groups unprotected by law and beyond the reach of a remedy at law --- justified by a narrow reading of American history, customs and traditions. This view arouses *Amicus* to demonstrate a contrasting interest and to ponder whether Respondents should be foreclosed by such arguments? The experience of African Americans in this country compels *Amicus* to answer this question in the negative. A claimed "ordered liberty" which, contrary to the equal protection clause of the Fourteenth Amendment, harms by action or inaction of the state, and limits incorporated, legally protected

interests beyond the scope of judicial review, can give rise to "ordered harm."

SUMMARY OF THE ARGUMENT

On November 3, 1992, a bare majority of Colorado voters approved a state constitutional amendment ("Amendment 2" or "Amendment"). Recognizing that the Amendment divested Colorado's gay, lesbian and bisexual citizens [hereinafter "homosexual citizens"] of the fundamental right to equally and effectively participate in the state's political processes, the courts of Colorado enjoined its enforcement. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) [hereinafter *Evans I*]; *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) [hereinafter *Evans II*].

The actual purpose underlying enactment of Amendment 2 was to target for harm a politically unpopular group. This goal is evidenced by the fear, hatred, and intolerance that drove supporters of Amendment 2. They "portray[ed] gays as sex-crazed, disease-ridden perverts out to destroy the traditional family." *All Things Considered: Gay Rights Battle Heats Up in Colorado* (National Public Radio broadcast, Feb. 12, 1993) [hereinafter "NPR Broadcast"]. This actual purpose mandates that even under rational basis review, the Amendment should be found unconstitutional. *See USDA v. Moreno*, 413 U.S. 528 (1973). No legitimate state goal can be posited that would be served by implementing the Amendment. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

Furthermore, Amendment 2 improperly places the state's power, authority, and sanction behind private biases and discrimination in contravention of the principle recognized in *Reitman v. Mulkey*, 387 U.S. 369 (1967), by depriving all branches, agencies and political subdivisions of the state of any power to ameliorate discrimination visited upon the homosexual citizens of Colorado based on their sexual orientation. Unlike the factual situation presented to the Court in *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982), upon which

Petitioners rely for reversal, homosexual Colorado citizens may be powerless to pursue any remedy to answer acts of invidious discrimination. In particular, homosexual African Americans would have no redress against discrimination based on race if that discrimination is camouflaged as based on sexual orientation. Thus, Amendment 2 may create a situation where homosexual citizens of Colorado have no rights, in public or private interactions, which heterosexuals are bound to respect. *Cf. Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

Amendment 2 also infringes on the fundamental right of equal participation in the political process by burdening an identifiable, and politically unpopular, group --- homosexual citizens --- when that group desires to enact legislation that affords protection from invidious discrimination. This political ostracism is antithetical to the historical protections afforded political and social minorities from the tyranny of intolerant majorities. The precedents of the Court direct that the Amendment be reviewed under heightened scrutiny and struck down as unconstitutional. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Colorado Supreme Court assumed, *arguendo*, that promoting religious liberty may be a substantial governmental interest. *Evans II*, 882 P.2d at 1342-43. However, Amendment 2 does not advance or unburden the free exercise of religion. Rather, it violates the Constitutional mandate that government remain neutral in matters of religion by promoting and favoring a particular religious view. *See Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

Amendment 2 impermissibly violates the privilege or immunity of Colorado's homosexual citizens to peaceably assemble and petition the government for redress of grievances in contravention of Clause 1 of the Fourteenth Amendment of the United States Constitution. *Evans II*, 882 P.2d at 1351 (Scott, J., concurring). Amendment 2 also impermissibly burdens the fundamental and long-recognized right of citizens to travel freely

between the states. *See Edwards v. California*, 314 U.S. 160 (1941); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230); *cf. Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964).

Furthermore, Amendment 2 also impermissibly burdens certain First Amendment rights. By divesting all branches of state government of the power to remedy harms caused by irrational individual biases --- establishing state-sanctioned discrimination --- Amendment 2 creates an atmosphere of fear that chills those most opposed to the Amendment from voicing their political opposition to its enactment. This burden on the fundamental right of free expression is contrary to the Court's long-established precedents. *See Roth v. United States*, 354 U.S. 476, 484 (1957); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

ARGUMENT

I. AMENDMENT 2 FAILS UNDER RATIONAL BASIS REVIEW BECAUSE ITS ACTUAL PURPOSE IS TO TARGET FOR HARM HOMOSEXUAL CITIZENS BY EMPOWERING, AND IMPERMISSIBLY INVOLVING THE STATE IN, PRIVATE DISCRIMINATION.

The Court has found unconstitutional under rational basis review government actions that target for harm non-suspect, politically unpopular or feared groups. *USDA v. Moreno*, 413 U.S. at 528; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 432. The statements, actions, and campaign materials of Amendment 2's supporters reveal that the Amendment's actual purpose is to target for harm a politically unpopular group --- an impermissible purpose under the Court's decisions in *Moreno* and *Cleburne*. As *Amicus* points out, *infra*, the means chosen by Petitioners encourage private discrimination and therefore cannot advance any legitimate government interest. Thus, *Amicus* submits that Amendment 2 violates the Equal Protection Clause of

the Fourteenth Amendment.

A. Amendment 2 Fails Under Rational Basis Review Because the Actual Purpose of the Amendment is to Target for Harm Homosexual Citizens.

Amendment 2 is unconstitutional because its actual purpose --- to target for harm a politically unpopular group --- is based on irrational fear and hatred of that group. In *Moreno*, the Court held that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *USDA v. Moreno*, 413 U.S. at 534. The Court, using rational basis review, struck down an amendment to the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), denying food stamps to households in which unrelated individuals resided. *USDA v. Moreno*, 413 U.S. at 529. The Court found that the purpose stated in the amendment's legislative history, "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," *id.* at 534, did not pass constitutional muster.

Likewise in *Cleburne*, the Court found that "mere [unsubstantiated] negative attitudes, or fear . . . are not permissible bases" for disparate treatment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 448. Furthermore, the Court held that

> the electorate[,] . . . whether by referendum or otherwise, cannot order [government] action violative of the Equal Protection Clause, . . . [nor] avoid the strictures of the Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Id. (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citation omitted)). The actual purpose of Amendment 2, and the irrational fear and hatred of homosexuals that prompted its passage, are revealed by the campaign statements and materials of the Amendment's supporters. This purpose can also be found in the climate of intolerance surrounding the issue of homosexuality in Colorado. For example, Colorado for Family Values ("CFV"), drafters of Amendment 2, was a primary promoter of the Amendment and spearheaded the referendum campaign. CFV distributed pamphlets containing unsubstantiated allegations that exacerbated an irrational fear and hatred of homosexuals. Certain CFV literature contained the spurious claim that "73 percent of homosexuals admit having sex with minors and 28 percent admit having sex with more 1,000 partners . . . [and] most gays urinate or defecate on their partners." Ned Zeman et al., *No Special Rights for Gays*, Newsweek, Nov. 23, 1992, at 32. Other CFV literature claimed, "gays 'are 12 times as likely' as heterosexuals to molest children and are out to 'destroy' the American family," Michael Meyer & Kenneth L. Woodward, *Onward Muscular Christians*, Newsweek, Mar. 1, 1993, at 68; and that "gays [are] sex-crazed, disease-ridden perverts out to destroy the traditional family." NPR Broadcast, *supra*. Another group supporting Amendment 2, Focus on Family, issued similar disinformation claiming that "'homosexual men ingest, on the average, the fecal material of 23 different men per year.'" Meyer & Woodward, *supra*.

The actual purpose of Amendment 2 is further revealed in statements made at a CFV-sponsored conference in Colorado Springs. At this conference, the executive director of Focus on Family said that "the gay agenda has all the elements of that which is truly evil." Tom Roberts, *Right Takes New Aim at Gays: Conservative Christians, In Secret Meeting, Lay Plans to Fight 'Evil' of the Gay Agenda: May 1994 Conference in Colorado Springs, CO*, Nat'l Catholic Rep., Sept. 2, 1994, at 4. Another speaker asserted that "equality is a new 'Satanic religion' and that 'inequality make[s] life better for the general mass of folk.'" *Id.*

In addition, one goal of a written course of action outlined by conference participants was to "[e]xpose that homosexuality . . . [is] . . . criminal. Homosexuals are [the] largest consumers of pornography. Hound-Hound-Hound. Drive it home!!!" *Id.*

The indications of the fear and hatred that motivated passage of Amendment 2 are found in the threats and acts of persecution against homosexuals citizens. For example, homosexual citizens have been victims of anonymous slurs and threats: "You queer dyke bitches!" (call to a women's bookstore in Denver); "You got too many fags and queers working there" (call to another Denver bookstore); "We're going to blow up your f------ building" (call to the Denver Gay and Lesbian Community Center); "FAGGOTS GET OUT OF THE ARTS" (message scrawled at the Denver Center for Performing Arts). Zeman, *supra*. The apartment door of an opponent of Amendment 2, on which was displayed a "No On [Amendment] 2" bumper sticker, was burned. Mark Shaffer, *Colorado Battling Boycott Over Anti-Gay Law*, Times-Picayune (New Orleans), Jan. 10, 1993, at A3. Immediately following the passage of Amendment 2, incidents of violence against homosexual citizens in Colorado increased, with "homophobic incidents tripl[ing] during November and December" of 1992. UPI, *Survey Shows an Increase in Homosexual-Related Violence*, Mar. 11, 1993, NEXIS NEWS Library, WIRES File. Indeed, the increase in violence against homosexual citizens in Denver continues despite a nationwide downward trend in levels of violence against homosexuals. UPI, *Reports of Anti-Gay Crimes Down*, Mar. 8, 1994, NEXIS, NEWS Library, WIRES File.

The foregoing establishes that the actual purpose of Amendment 2 was to target for harm a politically unpopular group. Its passage was motivated by an irrational and unsubstantiated fear of homosexuals similar to and, *Amicus* submits, even more alarming than, the irrational fear and hatred that were found to be constitutionally impermissible in *Moreno* and *Cleburne*.

Petitioners have asserted that Amendment 2 is rationally

related to several governmental interests. However, "just as the intentional harming of a group is not a legitimate goal, so too the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest." *Medoria v. Colautti*, 602 F.2d 1149, 1155 n.14 (3d Cir. 1979). As the United States so aptly stated in its *Amicus Curiae* brief, signed by Solicitor General Rex Lee, "even where [a] predicate exists for making frequent and pervasive distinctions . . . such distinctions may, in a particular case, be the cover for invidious hostility to a disfavored group, rather than a choice among competing legitimate ends." Brief for the United States as *Amicus Curiae* at 16, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (No. 84-468). Because Amendment 2 intentionally targets for harm homosexual citizens, the Amendment is not a rational means to further any governmental interest.

B. Amendment 2 Significantly Encourages and Involves the State in Private Discriminations, an Impermissible Means of Advancing Any Governmental Interest.

Amendment 2 unconstitutionally places the state's power, authority and sanction behind acts of private discriminations,"significantly encourag[ing] and involv[ing] the State in private discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). In *Reitman*, the citizens of California amended the State constitution by enacting Proposition 14, which allowed a property owner to discriminate on any basis when selling or renting property. Proposition 14 not only overturned two California statutes proscribing discrimination in housing but also barred the state and any of its subdivisions from enacting laws that outlawed discrimination in housing. The Court found it constitutionally repugnant that "the right to discriminate . . . was . . . embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Reitman v. Mulkey*, 387 U.S. at 377. The Court was especially concerned that "[t]he right to discriminate [was] . .

. one of the basic policies of the State." *Id.* at 381.

Colorado's Amendment 2 has the same effect as California's Proposition 14. Not only would Amendment 2 repeal local ordinances proscribing discrimination on the basis of homosexual or bisexual orientation, but it also would embody in the Colorado constitution authority which individuals could invoke when discriminating. For example, landlords in Colorado could capriciously evict homosexual tenants, justifying their action on authority granted by the state. Clearly this is unconstitutional because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 433.

Additionally, *Amicus* believes that Amendment 2, if allowed to stand, will provide an absolute defense for discriminating on the basis of race or other suspect classification. Amendment 2 would allow individuals to discriminate against citizens merely because an individual *thinks* that the other is gay. Thus, under Amendment 2 a bigoted employer could deny a position to any African American by simply asserting that he thought the applicant was homosexual, while the actual reason may be race-based. Enforcement of any anti-discrimination law would become almost impossible. Discriminators would be effectively immunized from liability by merely asserting that the accuser looked homosexual or seemed homosexual.

Petitioners attempt to draw the Court's attention away from the precedential impact of *Reitman* by asserting that "*Crawford* controls."[1] (Br. for Pet'r at 33). *Amicus* submits that *Crawford* is easily distinguished and simply does not control. *Crawford* merely held that the electorate of California could choose which remedies were available to the state courts to redress violations of state law. *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. at 535-36. *Crawford* does not stand for the proposition that all branches of state government may be foreclosed from ameliorating the effects of invidious

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[1] *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982).

discrimination. The facts in *Crawford* reveal that under the California constitution, all branches of state and local government continued to have a duty to implement remedies that exceeded the requirements of the federal Constitution. *Id.* at 535-36. Unlike the amendment in *Crawford*, Amendment 2 withholds all remedies from homosexual citizens for intentional discrimination and prohibits any legislative, administrative, or judicial action that would remedy discrimination against them. This is clearly unconstitutional under the Court's decisions in *Reitman* and *Palmore*.

II. AMENDMENT 2 SHOULD BE REVIEWED UNDER HEIGHTENED SCRUTINY BECAUSE IT IMPINGES ON THE FUNDAMENTAL RIGHT OF EQUAL PARTICIPATION IN THE POLITICAL PROCESS.

The precedents of the Court mandate use of heightened judicial scrutiny in cases where a majority acts to restructure the political process to purposefully disadvantage a minority. A law's

> presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer v. Union School Free Sch. Dist., 395 U.S. 621, 628 (1969). Similarly, "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny . . . ." *City of Richmond v. J.A. Croson*, 488 U.S. 469,

495-96 (1989). *Amicus* contends, as discussed at length in Section I, *supra*, that in passing Amendment 2 the people of Colorado have purposefully acted to disadvantage homosexuals in the state political process based on irrational and unwarranted fears.

A. Amendment 2 Impinges on the Fundamental Right of Equal Participation in the Political Process and is Therefore Subject to Strict Scrutiny Review.

The Supreme Court of Colorado correctly held that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny." *Evans I*, 854 P.2d at 1276 (footnote omitted).

Amicus is aware that the fundamental right to equal participation in the political process is not explicitly stated[2] in the text of the Constitution. However, the Court has recognized this right as fundamental because it is "preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. at 562, and because it "is the essence of a democratic society." *Id.* at 555. The Court explicitly defined the fundamental right of equal participation in the political process in *Hunter v. Erickson*, 393 U.S. at 385. There the Court stated, "the state may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393 (emphasis added). The right may also be fundamental under Article II, § 3 of the Colorado State

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[2] Rights do not have to be enumerated in the text of the Constitution in order to be recognized as fundamental. For example, the right to travel freely from state to state has no textual basis in the Constitution, but has long been recognized by the Court as fundamental. *See United States v. Guest*, 383 U.S. 745, 758 (1966). *See also* U.S. Const. amend. IX.

Constitution.[3]

Amendment 2 implicates this recognized fundamental right because it politically ostracizes the homosexual citizens of Colorado. If enforced, the Amendment would foreclose effective lobbying towards enactment of local ordinances, or even state wide statutes, drafted to protect an independently identifiable group from invidious discrimination. *Amicus* is particularly concerned that this burden exceptionally affects African American citizens of Colorado who are homosexuals. The higher burden Amendment 2 would impose on African American homosexual citizens who wish to have ordinances and laws enacted to protect themselves from discrimination clearly violates the fundamental right recognized in *Hunter*. Amendment 2 would leave homosexual citizens with no method of protecting themselves from discrimination, except the burdensome process of amending the state constitution.[4] This sole method of change left to homosexuals is illusory. In reality, a Babylonian wall has been erected, creating near futility for those who try to scale its insuperable height.

Petitioners have urged a narrow construction of the rule announced in *Hunter*, contending that the city charter amendment at issue in that case failed only because it burdened a racial minority, (Br. for Pet'r at 19-24), and that application of *Hunter*

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[3] The Colorado Constitution, provides, "[a]ll persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Colo. Const., art. II, § 3.

[4] *Amicus* contends that the District Court in Cincinnati correctly observed that "allowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation unless they request it directly from the very majority that deprived them access to the legislature in the first place, violates even rudimentary notions of fundamental fairness, and undermines the integrity of our nation." *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 433 (1994), *rev'd*, Nos. 94-3855, 94-3973, 94-4280, 1005 U.S. App. LEXIS 10462 (6th Cir. May 12 ,1995). For a discussion of the full practical scope of this burden see section VI, *infra*.

should therefore be limited to situations where a racial minority is the group burdened. (Br. for Pet'r at 19.) Petitioners misstate *Hunter*. Specifically, Petitioners' argument is flawed in two respects: First, a plain reading of *Hunter* and its underlying facts indicate the Court was not restricting its holding to cases involving racial minorities; second, petitioners misinterpret the cases on which they rely to support a narrow construction of *Hunter*.

The *Hunter* Court found the charter amendment at issue was constitutionally repugnant not because it burdened a racial minority alone, but because it "disadvantages those who would benefit from laws barring racial, *religious, or ancestral* discriminations." *Hunter v. Erickson,* 393 U.S. at 391(emphasis added). Thus, the fundamental right recognized in *Hunter* is vested in racial minorities *and in other identifiable groups*. Additionally, it is significant to note that the Court based its final holding on cases that did not involve any impermissible racial classification. *Id.* at 393 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968)).

Petitioners contend that the Court's decision in *James v. Valtierra,* 402 U.S. 137 (1971),[5] should be read to limit the *Hunter* rule exclusively to situations where racial minorities are affected. (Br. for Pet'r at 24). This is a misreading of the *Valtierra* decision. The Court's decision in *Valtierra* merely helped define the contours of the right recognized in *Hunter*: The Court did not apply *Hunter* to a situation where the persons burdened are "a diverse and shifting group." *James v. Valtierra*, 402 U.S. at 142. Soon after *Valtierra*, the Court, in *Gordon v. Lance*, 403 U.S. 1 (1971), further clarified the contours of the fundamental right of equal participation in the political process. There the Court refused to invalidate an electorate super-majority approval requirement for bond indebtedness because it could "discern no *independently identifiable group or category* that

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[5] In *Valtierra,* the Court declined to strike down a requirement that approval for low-income housing projects be subject to local referenda.

favors bonded indebtedness over other forms of financing. Consequently, no *sector of the population* may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* at 5 (emphasis added) (citation omitted).

Read together, *Gordon* and *Valtierra* stand for the proposition that the fundamental right defined in *Hunter* extends to situations where the group burdened is an "identifiable class" independent of its common political goal. *Id.* at 7. These cases are best understood to mandate that qualification as an independently identifiable group is limited. The members of the putative independently identifiable group must establish the existence of a dual relationship. That is, the members of the group must seek similar political ends *and* must have some metaphysical and cultural indicia of commonality independent of the political goal.[6]

The homosexual citizens of Colorado are independently identifiable under this two-prong test: They seek the political end of protection from invidious discrimination, and they share an indicium of commonality in sexual orientation independent from the desired political protection. Amendment 2, by eviscerating homosexual citizens' right to pass self-protective legislation, impermissibly impinges on this independently identifiable group's fundamental right to equally participate in the political process. Such treatment by the majority over a minority casts shadows of long-since-rejected customs of denying rights and privileges of citizenship to a minority. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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[6] The requirement of the metaphysical and cultural characteristic of commonality, independent of the political goal, eliminates the concern that organizations like political parties could be recognized within the independently identifiable group ambit. Courts have no trouble recognizing when a group has claimed independently identifiable status based on a political goal that erroneously attempts to find status as metaphysical commonality. *E.g. Gordon v. Lance*, 403 U.S. 5, 7 (1971).

B. Amendment 2 Serves No Legitimate State Interest in Advancing Free Exercise of Religion and Creates an Establishment of Religion.

Amendment 2 was not enacted to further any state interest in the free exercise of religion. At trial, Petitioners advanced freedom of religion as an interest of the state served by Amendment 2. They now assert that "freedom of choice [regarding] religion," (Br. for Pet'r at 39-40), is a legitimate state interest advanced by Amendment 2. They further assert that promotion of religious freedom is a "'compelling' public purpose[] served ---- albeit inexactly --- by Amendment 2." (Br. for Pet'r at 40.) Petitioners have not, however, asserted that there exists any compelling state interest served by Amendment 2.[7] *Amicus* addresses the issue of religious free exercise separately because the Supreme Court of Colorado "[a]ssum[ed] *arguendo*" that anti-discrimination ordinances such as those in place in Aspen and Boulder burden religious liberty. *Evans II,* 882 P.2d at 1342.[8]

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[7] Free exercise of religion was not found to be a compelling state interest by the Colorado Supreme Court. That court noted only that "[freedom of religion] is among the highest values of our society," *Evans II*, 882 P.2d at 1342, and that "ensuring religious freedom is a compelling governmental interest," *id.*, but held that "none of the interests identified by [Petitioners] are compelling." *Id.* at 1342 n.5.

[8] Even if relieving a burden on the free exercise of religion was a compelling state interest, Amendment 2 remains constitutionally infirm. Petitioners readily admit that "[t]o promote free exercise values by [Amendment 2] may not be a tailored response," (Br. for Pet'r at 45), to the claimed burdens imposed by the anti-discrimination ordinances in Aspen and Boulder. *Amicus* contends that encouraging wholesale private discrimination against homosexual citizens by other Colorado citizens, regardless of whether those citizens' free exercise rights are actually burdened, can never constitute a tailored response to any compelling state interest.

As the Colorado Supreme Court found, "the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious

While *Amicus* agrees that facilitating the free exercise of religion can be a legitimate state interest, such an interest does not exist in this case. And although this case does not represent a free exercise claim, the Court's Free Exercise Clause jurisprudence informs the analysis of Petitioners' assertion that Amendment 2 is rationally related to a legitimate state interest in accommodating the free exercise of religion. The Court has stated that:

> "[l]aws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . . [To permit] a man [to] excuse his practices to the contrary because of his religious belief . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States* 98 U.S. 145, 166-67 (1879)).[9] Furthermore, the Court stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," *id.* at 878-79, and that "'[c]onscientious scruples . . . have not relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'" *Id.* (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). The

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liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose would be simply to require that antidiscrimination laws . . . include exceptions for religiously-based objections." *Evans II*, 882 P.2d at 1342-43.

[9] *See also Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (stating that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests").

Court further held that an asserted claim of religious belief can be "so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

Petitioners state that Amendment 2 more than meets a traditional rational basis test, (Br. for Pet'r at 39), "because the State . . . presented convincing evidence . . . that Amendment 2 promotes freedom of choice (relating to matters of . . . religion)." (Br. for Pet'r at 39-40). The record in this case clearly proclaims otherwise. Petitioners' assertion that "landlords and employers who have sincere and profound religious objections to homosexuality would . . . be compelled to compromise those convictions," (Br. for Pet'r at 44), by the ordinances sought to be repealed by Amendment 2 is wholly without support in the record. No Coloradan landlord or employer --- indeed *no Coloradan* --- presented evidence at trial as having been burdened in his or her religious practice due to the ordinances preempted by Amendment 2.[10] If the record reveals anything about the interests in passing Amendment 2, it is that the proponents of Amendment 2 were motivated by a desire to halt "militant gay aggression." (Pet. for Writ. of Cert. App. C at 7.)

Petitioners' glaring inability to present even a modicum of evidence that Colorado's valid, generally applicable anti-discrimination laws burdened religious freedom clearly establishes that Amendment 2 is not rationally related to a governmental interest in promoting free exercise of religion. *Amicus* thus urges the Court to recognize Petitioners' claim for what it is: A post hoc rationalization made in an effort to resuscitate a moribund and constitutionally infirm law and to mask the Amendment's actual purpose.

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[10] Petitioners assert that Artine Yapoujian, a coffee shop owner whose wife was required to attend sensitivity training after she distributed religious literature on homosexuality to a homosexual employee, was somehow burdened in his free exercise of religion. (Br. for Pet'r. at 44) . However, as Respondents correctly point out, Yapoujian affirmatively stated that he had no religious objection to homosexuality. (Br. in Opp. to Writ of Cert. at 19 n.17.)

Furthermore, *Amicus* submits that Amendment 2 not only fails to relieve any actual burden on religious practice but also arguably creates an establishment of religion in Colorado by placing the state's imprimatur behind an asserted religious belief. The Court has stated that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause . . . ." *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992). While the precise limits of the Establishment Clause's "fundamental limitations" continue to be refined,[11] "one requirement is clear: [A]ccommodation must lift a discernible burden on the free exercise of religion . . . . Concern for the position of religious individuals in the modern regulatory state cannot justify solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief." *Id.* at 677 (Souter, J. concurring) (citations omitted).[12]

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[11] *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2503 (1994) (Kennedy, J., concurring) (stating that "in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines"). In regard to what comprises the Establishment Clause's "fundamental limitations," *Amicus* asserts that a state's action to advance religious freedoms exceed the Clause's fundamental limitations when that action trammels individuals' liberty interests. *Amicus* recognizes that it is beyond question that values of religious freedom embodied in the Religion Clause have been "zealously protected," *Wisconsin v. Yoder*, 460 U.S. at 214, and that the Court has long held that a state may not facilitate general religious liberty by abridging an individual's right to exercise religious liberty. *See Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (stating that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."); *see also Wallace v. Jaffree*, 472 U.S. 38, 60 n.51(1985) (holding that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religions minorities to conform to the prevailing officially approved religion is plain") (citations omitted). This principle should undoubtedly follow when accommodation of religion threatens individual liberty interests — such as the right to petition government for the redress of grievances — which, *Amicus* urges, should be accorded similar zealous protection.

[12] *See also Allegheny County v. ACLU (Greater Pittsburgh Chapter)*, 492 U.S. 573, 601 n.51 (1989) (holding that "[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free

Amendment 2 lifts no discernible burden on the free exercise of religion. Rather, it reflects Colorado's political majority's concern for adherents to a particular religious belief and their position in the modern regulatory state. That is, Amendment 2 seeks to "exempt" those persons with a shared religious view opposing homosexuality from complying with the valid, generally applicable laws regulating housing, employment, and public accommodations. Consequently, Amendment 2 offends the Establishment Clause's command of state neutrality on questions of religion and fails to foreclose religious favoritism in contravention of the "principle at the heart of the Establishment Clause that government should not prefer . . . religion to irreligion." *Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2491 (1994). *Amicus* believes the Court should go slowly in rendering judgment that may support particularized religious beliefs to the burden of non-believers. For "[i]n a free government the security for civil rights must be the same as that for religious rights." The Federalist No. 51, at 351(James Madison) (Jacob E. Cooke, ed., 1961).

III. AMENDMENT 2 DEPRIVES HOMOSEXUAL CITIZENS OF THE PRIVILEGES OR IMMUNITIES UNDER THE FOURTEENTH AMENDMENT TO PEACEABLY ASSEMBLE AND PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES.

Amicus submits that Amendment 2 violates the Privileges or Immunities Clause of the Fourteenth Amendment by allowing a state electorate to intrude upon the rights of homosexual citizens

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exercise of religion. (citation omitted). The display of a creche in a courthouse does not remove any burden on the free exercise of Christianity"); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment) (stating that "in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action").

to peaceably assemble and petition the government for redress of grievances. *See generally Evans II*, 882 P.2d at 1350-56 (Scott, J., concurring).

The meaning of privileges or immunities of citizens of the United States, as used in the Fourteenth Amendment, was first addressed in 1872 in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1872). The rationale of the majority in the *Slaughter-House Cases* recognized the principle of federalism. However, Petitioners cannot demonstrate that the principle was ever intended to empower states with the authority to deprive homosexual citizens, or any citizen of Colorado, of a meaningful opportunity to petition their state or local governments for redress of grievances.

The scope of the Privileges or Immunities Clause was substantially narrowed by the *Slaughter-House Cases.* The majority found that the privileges or immunities of United States citizens are limited to those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. However, the Court intentionally refrained from citing an exhaustive list of those privileges or immunities, reserving its power to define privileges or immunities "*until some case involving those privileges may make it necessary to do so.*" *Id.* at 79 (emphasis added).

Amicus thus submits that the necessity exists to define a vital privilege or immunity in the case *sub judice*. In Colorado, an overbearing majority deprived homosexual citizens of a meaningful opportunity to petition state or local governments for redress of grievances. The deprivation or undue burdening of this privilege or immunity embarrasses the principles of democracy. As Justice Scott declared, "[l]ike the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is *meaningless* if by law government is powerless to act." *Evans II*, 882 P.2d at 1355 (Scott, J., concurring)(emphasis added).

It is true, of course, that majority rule is the cornerstone of democracy. Still, the Framers warned that certain issues should

never be decided by the majority. James Madison, for example, declared that "[i]t is of great importance in a republic, not only to guard society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." *See* The Federalist No. 51, at 351. The scheme of Amendment 2 is illustrative of the type of injustice that the Framers sought to prevent. Under Amendment 2, homosexual citizens' right to lobby would be rendered illusory, because the Amendment bars state representatives from enacting laws in accord with homosexual citizens' interests. Thus the process of persuasion is rendered futile.

Amicus asserts that the opportunity to peaceably assemble and to petition government for the redress of grievances is inviolate under the Privileges or Immunities Clause of the Fourteenth Amendment where denied by state action in the same light as if this fundamental right were denied by the national government. There is ample evidence in the legislative history of the Privileges or Immunities Clause to suggest that peaceable assembly and the petitioning of state governments for redress of grievances is a privilege or immunity of United States citizens.[13] As the authors of the Fourteenth Amendment specifically asserted, the purpose of the Privileges or Immunities Clause was to "restrain the power of the States and compel them at all times to respect . . . [the] fundamental guarantees of [citizens]." *See* Cong. Globe, 39th Cong., 1st Sess. 27565-66 (1866) (statement of Sen. Howard). *Amicus* urges the Court to trust the specific conceptions and intentions of the drafters of the Privileges or Immunities Clause by recognizing that peaceable assembly to petition state governments for redress of grievances are privileges or immunities of United States citizenship.

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[13] For support of this proposition *Amicus* respectfully refers the Court to Justice Scott's concurring opinion in *Evans II*, 882 P.2d at 1350-56. *See also Adamson v. California*, 332 U.S. 46, 92-123 (1947) (Black, J., dissenting).

IV. AMENDMENT 2 VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL.

Amendment 2 violates the fundament right of homosexual citizens to travel, migrate, and move freely between states. Long-standing precedent establishes that "[t]he constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966).[14] Moreover, the Court, has held that whenever a state law infringes upon this constitutionally protected right, the state must justify such infringements as necessary to promote a compelling governmental interest under heightened scrutiny review.[15]

Even if the object and purpose of Amendment 2, on its face, is not interpreted as an attempt to exclude homosexual citizens from the state of Colorado, the inevitable effect of Amendment 2 would be to discourage and deter homosexual citizens from residing in, traveling to, or migrating to Colorado.

While the Court has not explicitly quantified the measure of impact on a citizen's right to travel necessary to give rise to a constitutional violation, the Court has held that a state law violates the right to travel when it *actually deters* such travel, *see, e.g., Crandall v. Nevada,* 73 U.S. (6 Wall.) 35, 43-44 (1867); when inhibiting free movement between states is its primary

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[14] *See also* the Articles of Confederation art. IV (stating that "[t]he free inhabitants of each of these States . . . shall have *free ingress and regress to and from any other State* . . . ." (emphasis added); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (stating that "among the rights and privileges of *National* citizenship recognized are the right to pass freely from State to State"); *Edwards v. California*, 314 U.S. 160, 177 (1941) ("the right of free movement is a right of national citizenship stands on firm historical ground") (Douglas, J., concurring) (emphasis in original); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (holding that the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution") (citation omitted).

[15] *Shapiro v. Thompson*, 394 U.S. 618; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

objective, *see, e.g., Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); or "when it uses any classification which serves to *penalize* the exercise of that right." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (emphasis added) (citations omitted).

The deprivation by Amendment 2 of homosexual citizens' rights imposes real and undue barriers to interstate travel that are unconstitutional.[16] Amendment 2, by subjecting homosexual citizens to both private and governmental discrimination in the state of Colorado, will "actually deter" individuals from traveling or migrating to Colorado. Amendment 2, for example, will inevitably allow restaurant owners, hotel managers, convenience store and gas station owners to exclusively refuse services to citizens who are suspected or known to be homosexuals.[17] Furthermore, by facilitating discrimination and by nullifying legislative and judicial action to allow redress for such discrimination, Amendment 2 eviscerates the concept of citizenship and deprives homosexual citizens of the necessary

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[16] Amendment 2 will undoubtedly result in "more than [just] a negligible or minimal impact on the right to travel . . . ." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. at 921 (O'Connor, J., dissenting) (arguing that a realistic burden on interstate travel must be shown).

[17] It has long been recognized by the United States Congress and the Supreme Court that state approved discrimination results in a significant impediment against interstate travel. *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964). This raises the issue of whether Amendment 2 is facially invalid because of its deterrent effect on interstate commerce. *See, Edwards v. California*, 314 U.S. at 177-185 (Douglas, Black, Murphy, Jackson, JJ., concurring).

Allowing innkeepers, for example, to discriminate in affording lodging to homosexual and bisexual citizens, on the basis of their sexual orientation, works a substantial burden on interstate commerce by dissuading such citizens from traveling to the state of Colorado. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

This effect is not incidental, especially considering the importance of the tourist industry in Colorado. *See, e.g.*, Laurie Asseo, *High Court to Take Up Major Gay-Rights Case*, Charleston Gazette, Feb. 22, 1995, at 1A (describing Amendment 2 as having cost the state of Colorado "about 40 million in convention business" resulting from boycotts).

safeguards required to travel to or through the state of Colorado.

Amendment 2's inevitable effects will deter homosexual citizens from migrating or resettling to the state. Amendment 2 will in effect require migrating homosexual citizens (including Colorado homosexual citizens) to accept an inferior status to that of other classes of Colorado citizens. *See Shapiro v. Thompson*, 394 U.S. at 627; *cf. Zobel v. Williams*, 457 U.S. 55, 74 (1982). Realistically, homosexual citizens would not risk subjecting themselves to discriminatory treatment by relocating to Colorado, knowing that the state could neither protect them from such discrimination nor provide them with any kind of redress.[18]

Finally, *Amicus* contends that upholding Amendment 2 could establish a dangerous precedent that encourages other states to enact similar laws. In *Crandall,* the Court invalidated a law that allowed the state to levy and collect a capitation tax of one dollar upon every person leaving the state. In acknowledging the unavoidable burden imposed on the freedom of movement of citizens between states, the Court also recognized the perilous effect of setting a precedent for other states to follow which could have resulted in "seriously burden[ing]" the free movement of citizens from one part of the country to the other. *Crandall v. Nevada,* 73 U.S. (6 Wall.) at 46.

Upholding Amendment 2 as a constitutional provision, therefore, could pave the path for similar amendments to be enacted throughout various states, ultimately with the effect of completely denying or seriously burdening the fundamental right of homosexual citizens to travel from one state to another. The right of individuals to pass freely without restraints from one state to another should never be dependent "upon the pleasure of a State over whose territory [individuals] must pass." *Id.* at 43. As

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[18] The cumulative effect of such statutes creates the enormous possibility that its confluent prohibitions will restrict commerce and deny citizens protection from discrimination under the the Privileges or Immunities Clause.

pointed out by Justice Douglas in *Edwards v. California,* if a state tax (referring to *Crandall*) is deemed invalid because of its deleterious impact on a citizen's fundamental right to travel, then "*a fortiori* a state statute which obstructs or in substance prevents that movement must fall." *Edwards v. California*, 314 U.S. at 181 (Douglas, J., concurring).

V. AMENDMENT 2 IMPINGES ON FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioners have contended that enforcement of Amendment 2 would enhance individual freedoms guaranteed by the First Amendment. (Br. for Pet'r at 43.) *Amicus* believes that just the opposite is true. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). The discrimination that Amendment 2 would allow to be visited upon the homosexual citizens of Colorado[19] could effectively silence all meaningful public debate and discussion of the issue.

The First Amendment assures the "unfettered interchange of ideas for the bringing about of political and social change desired by the people."[20] Thus, it is the duty of the Colorado state

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[19] Amendment 2 "prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved . . . ." *Evans II*, 882 P.2d at 1345.

[20] *Roth v. United States*, 354 U.S. 476, 484 (1957). Although the breadth of and extent to which various types of speech are protected by the First Amendment have long been debated by the Court, as well as by scholars, all who have closely examined the issue have conceded that political expression should be accorded the highest protection. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs); *Garrison v. Louisiana*, 379 U.S. 64, 85 (1964) ("speech concerning public affairs is more than self expression; it is the essence of self-government").

government to prevent abridgment of this most "fundamental personal [right] and libert[y]." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Additionally, it is well recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Indeed, the Court has been consistent in striking down laws that have the effect of "reducing the total quantum of speech on a public issue." *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

If the Court fails to affirm the decision of the Supreme Court of Colorado and allows Amendment 2 to take legal effect, *Amicus* believes that the decision will have the real potential of creating a chilling environment, preventing homosexual citizens from expressing their political displeasure with Amendment 2. Homosexual citizens would be forced to remain silent about both their status and their opposition to Amendment 2 in order to avoid retaliatory discrimination on the basis of status, while continually living in fear of discovery. Voicing political disagreement with Amendment 2 would expose the protester to serious practical risks: The potential of loss of employment, eviction, or some other ordered harm, all examples of loss of liberty. *See* Karst, *supra*, at 21.

The extent to which Petitioners desire to seek to quiet the voices of homosexual citizens, in contravention of these long recognized First Amendment protections, is best illustrated by petitioners' comparison of homosexuals with convicted criminals. *See* (Pet. for Writ of Cert. at 16). Taken to its logical conclusion, Petitioners' argument asks that the Court accept the proposition that homosexual citizens enjoy only the rights of political access equivalent to those held by convicted criminals because homosexual sodomy can be outlawed. The Colorado Supreme Court found this reasoning fallacious. *Evans II*, 882 P.2d at 1350.

This contention of Petitioners, although unsound legally, is demonstrative of a desire to quell the political power and voices of, and to limit the liberty of, those most interested in seeing

discrimination against homosexual citizens stopped. Forcing any group to attempt to obtain protective legislation through a rigorous amendment process, while adding the attendant risk of unremediable discrimination, deters open discourse regarding the matter and chills First Amendment rights of groups dedicated to passage of the amendment. *Cf. Williams v. Rhodes*, 393 U.S. 23 (1968). Moreover, the deterrent effect of the law would not result merely from threat of retributive acts against those protesting the implementation of Amendment 2.[21] Rather, any time homosexual citizens voiced a political position that exposed their sexual orientation they would open themselves to state-approved discrimination.[22]

Further, since a person's sexual orientation is not readily apparent, there is a greater risk that landlords and employers would inquire into applicants' sexual preferences. It is not hard to imagine the types of intrusive questions regarding sexual orientation that will become commonplace on application forms for everything from jobs to drivers' licenses. The Court has closely scrutinized government inquiry into associational privacy, *see, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958). *Amicus* believes the Court should be cautious when empowering private citizens to make important public determinations based on the same type of inquiries.

The foreseeable inquiries by private or public agents in Colorado, similar to the reporting requirements struck down in *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), would result in "public exposure and

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[21] The discrimination that would be legalized by Amendment 2, however, would result in egregious harms being visited on those protesting the amendment that are sufficient, by themselves, to invalidate the amendment. *Equality Found. of Cincinnati v. City of Cincinnati*, 860 F. Supp. at 447 (1994), *rev'd*, 1005 U.S. App. LEXIS 10462 (6th Cir. May 12, 1995). *Amicus* believes that the District Court was correct in noting that "the consequences of attempting to supersede the [amendment]" result in "the exorbitant risk of employment and housing discrimination." *Id.* at 446.

[22] *See* discussion at Section I, B, *supra*.

harassment" of homosexual citizens "who chose to exercise [a] personal, intensely private right." *Id.* at 767. In this regard, *Amicus* urges the Court to reconsider the privacy concerns raised by Justice Stevens in *Bowers v. Hardwick*:

> From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

Bowers v. Hardwick, 478 U.S. 186, 218-19 (1986) (Stevens, J., dissenting). Consenting homosexual adults should enjoy a fundamental right of privacy to make decisions about their intimate personal relationships equivalent to their heterosexual counterparts. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969). Selective denial of a fundamental right of privacy based on a history of hatred, intolerance, and marginalization is antithetical to the basic concepts that underpin our Bill of Rights. *See Loving v. Virginia*, 388 U.S. 1 (1967).

Amendment 2's very consequential infringement of fundamental rights is repugnant to the respect accorded to the ideas of social minorities. Justice Brandeis eloquently expressed the highest ideals of the First Amendment when he said that the Framers

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).[23] The fear of reprisal that Amendment 2 would, as a function of the state's imprimatur,[24] instill in those most interested in its opposition must not be triggered.

VI. THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE SEVERAL STATES TO ABROGATE THE FUNDAMENTAL RIGHTS OF STATE CITIZENS.

Petitioners, and *Amici* in support of the Petitioners, have urged the Court to read its prior decisions, evaluate the core principles of federalism, and analyze the Tenth Amendment in order to support the remarkable proposition that the United States Constitution allows the people of Colorado to amend their state constitution in a fashion that contravenes fundamental rights of Colorado citizens.[25] These arguments mischaracterize the Court's prior holdings, traditional conceptions of state sovereignty, and the nature of the Tenth Amendment.

Petitioners particularly rely on the Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to support their new conception of federalism. However, the Petitioners misapprehend the breadth of the *Ashcroft* decision and rely on it to prove too much. The Court in *Ashcroft* merely announced the rule that where Congressional intent is ambiguous, and state sovereignty in choosing qualifications for office-holders is at issue, the Court should carefully scrutinize an interpretation of a national law

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[23] *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) (warning of the dangers of "Orwellian announcement[s]" that "endorse[ ]. . . the principle that too much speech is an evil that the democratic majority can proscribe").

[24] *See Reitman v. Mulkey*, 387 U.S. at 376 (recognizing that the state of California had improperly encouraged private discrimination by discontinuing enforcement of anti-discrimination laws).

[25] The Colorado Courts found no validity in Petitioners' Tenth Amendment arguments. The state's "legal argument is not supported by federal or state case law, nor is it by the Colorado Constitution." *Evans II*, 882 P.2d at 1340.

which would preempt state authority. *Gregory v. Ashcroft*, 501 U.S. at 470. The narrowness of the *Ashcroft* holding has been recognized a number of times. *See Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993); *EEOC v. Massachusetts*, 987 F.2d 64, 69 (1st Cir. 1993). This limited holding cannot be used as the keystone which supports Petitioners' thematic argument that the Court is bound to legitimize the constitutional infringements enacted by the electorate in the state of Colorado.[26]

The true core principles of federalism are embodied in the text of the Tenth Amendment. However, Amendment X of the United States Constitution was formulated not as a sword to be used by the several states to abridge the fundamental rights of social and political minorities, but rather as a shield, to protect the states from federal tyranny and to expedite achievement of "the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. at 459.[27] As the Court made clear in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), "insulation [from federal judicial review] is not carried over when state power is used as an instrument for circumventing a federally protected right." State sovereignty does not create constitutional validity for Amendment 2. Rather, as recognized by all the Colorado courts that have considered the issue, Amendment 2 impinges on numerous constitutionally protected rights and should be struck down as constitutionally infirm.

CONCLUSION

Amicus submits that the case *sub judice* should be affirmed.

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[26] Interestingly, Petitioners fail to indicate why the Court should ignore federalism-based comity principles which would militate for deference to the decision of the Colorado Supreme Court.

[27] *See also Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (recognizing that liberty and justice are non-existent if the state is allowed to abrogate fundamental rights); Robert H. Bork, *Neutral Principals and Some First Amendment Problems*, 47 Ind. L.J. 1, 2-3 (1971) (stating that our Madisonian democracy "assumes that there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them").

Respectfully submitted,

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May 26, 1995

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Pages**

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 6, 8
Civil Rights Cases, 109 U.S. 3 (1883) 11
Communist Party v. SACB, 367 U.S. 1 (1961) 11
Cruzan v. Director, Missouri Dept. of Health,
497 U.S. 261 (1990) 5
DeShaney v. Winnebago Cty. Soc. Servs. Dept.,
489 U.S. 189 (1989) 5
Farmer v. Brennan, 114 S.Ct. 1970 (1994) 10
Green v. United States, 356 U.S. 165 (1958) 11
Railway Express Agency v. New York,
336 U.S. 106 (1949) 5

Constitutional Provisions, Statutes and Rules:

Fourteenth Amendment, U.S. Constitution . . . . . *passim*
Article II, Sec. 30b of the Colorado Constitution . . . . . *passim*
Denver Police Dept. Reg. RR-128 8

Miscellaneous:

Letter from Justice Bradley to Judge Woods
of March 12, 1871 12
Cong. Globe, 41st Cong., 2d Sess. 3611 (1870) 12
Cong. Globe, 42nd Cong., 1st Sess. 334 (1871) 12
Cong. Rec., 43rd Cong., 1st Sess. 412 (1874) 12

STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned constitutional scholars submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law. They are **Laurence H. Tribe**, Tyler Professor of Constitutional Law, Harvard Law School (counsel of record); **John Hart Ely**, Paradise Professor of Law, Stanford Law School; **Gerald Gunther**, William Nelson Cromwell Professor of Law, Stanford Law School; **Philip B. Kurland**, William R. Kenan, Jr. Distinguished Service Professor Emeritus, University of Chicago; and **Kathleen M. Sullivan**, Professor of Law, Stanford Law School. They submit this brief *pro se*, representing no institution, group, or association. Their sole purpose is to offer what assistance they can to this Court as it considers and decides this important case about the meaning of the Equal Protection Clause of the Fourteenth Amendment. In particular, this brief is filed to present to the Court an argument in support of the judgment below that is quite different from and more basic than the one relied upon by the Colorado Supreme Court.

SUMMARY OF ARGUMENT

This brief argues that Colorado's Amendment 2 constitutes a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." That command is violated when a state's constitution renders some persons ineligible for "the . . . protection of the laws" from an entire category of mistreatment — here, the mistreatment of discrimination, however invidious and unwarranted. If Colorado had declared some people within its jurisdiction completely ineligible for the protection of its laws, existing or future, from some other form of mistreatment — unjustified physical assault, for example — no one would doubt that such state action would constitute a *per se* denial of the equal protection of the laws. Selectively decreeing some "person or class of persons," to use Amendment 2's language, ineligible for legal protection from mistreatment in which the wrong charged takes the form of *discrimination as such* is every bit as offensive on its face to the principle of equality before the law.

States have no affirmative duty to enact or retain special laws for each individual or group who might be victimized by discriminatory treatment — that is, by injurious treatment that reflects prejudice and is neither privileged nor rationally justified by the context in which it occurs — just as they may well have no affirmative duty to enact or retain laws directed at other forms of wrongful treatment. But it is quite another matter for a state's constitution absolutely to preclude, for a selected set of persons, even the possibility of protection under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful.

Amendment 2 does just that. It does not simply write into the state's constitution a substantive rule that a particular sphere of conduct — for example, expelling a guest from one's home on whatever basis one wishes, however "prejudiced" one's reasons for finding the guest unwelcome — is a matter for private choice that inflicts no wrong at all and accordingly may not be made the basis of any claim for legal redress by *anyone*. Far from merely isolating particular types of injurious conduct as privileged in light of the context in which they occur, Amendment 2 absolutely precludes legal recognition, by any arm or subdivision of the state, of "any . . . claim of . . . discrimination," regardless of context, and however invidious and unjustified the discrimination might be, whenever that discrimination entails harming another person on account of that person's homosexual identity.

To recognize that Amendment 2 works a *per se* violation of the Equal Protection Clause requires no benign or even neutral view of what Amendment 2 calls "homosexual . . . orientation, conduct, practices or relationships." For literally *any* characteristic — even one on the basis of which a state may properly deny benefits or impose disabilities in a wide variety of circumstances — can sometimes become the basis for deprivations that are prejudiced rather than justified, and that are not privileged by the special context in which they occur. When Amendment 2 explicitly creates, for selected persons, a unique hole in the state's fabric of existing and potential legal protections against that admitted wrong, it provides a paradigm case of what it means for a state to structure its legal system so as to "deny" to "person[s] within its jurisdiction the equal protection of the laws."

Never since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2 — a measure that, by its express terms, flatly excludes some of a state's people from eligibility for legal protection from a category of wrongs. Whether there might be adequate justification for a state's decision to treat homosexuals, or any other group of persons, less favorably than others *in particular circumstances*, and by what standard such a state decision should be reviewed, are questions the Court need not address in this case. All the Court needs to decide in order to affirm the judgment below is that a state's constitution *by definition* denies equal protection of the laws when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.

ARGUMENT

Amendment 2 is a rare example of a *per se* violation of the Equal Protection Clause. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Nearly all the cases explicating that command focus on two questions: First, what features of a law — such as its impact on fundamental rights or its use of suspect classifications — should trigger heightened scrutiny of differences in treatment? Second, using the appropriate level of scrutiny, which differences in treatment should be deemed unjustified and therefore discriminatory? Amendment 2, in stark contrast, involves a prior and more basic question, whose answer does not require any inquiry into the nature of the rights that Amendment 2 might be thought to restrict, or of the class it might be said to target: May a state set some persons apart by declaring that a personal characteristic that they share may not be made the basis for *any* protection pursuant to the state's laws from *any* instance of discrimination, however invidious and unwarranted?

The answer to that question must be no. To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or

regulation enacted, previously or in the future, by the state, its agencies, or its localities — when persons and groups not sharing this characteristic are not similarly handicapped — is, *by definition*, to deny the "equal protection of the laws" to persons having that characteristic. Yet this is precisely what the State of Colorado has done. Amendment 2 (Article II, Sec. 30b of the Colorado Constitution) provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or *claim of discrimination*.

No extrapolation from precedents dealing with racial or other minorities, or from precedents dealing with rights of political or legal participation, is needed to conclude that this selective preclusion of claims of discrimination violates the Equal Protection Clause. Its facial unconstitutionality flows directly from the plain meaning of the Fourteenth Amendment's text. For Amendment 2 renders a "class of persons" in Colorado completely ineligible for the protection of its laws from an entire category of mistreatment. Had Colorado explicitly declared some people within its jurisdiction completely ineligible for the protection of its laws from some other form of mistreatment — from robbery, for example, or blackmail, or any other wrongful infliction of harm — no one would doubt that such discriminatory state action would "deny [such persons] the equal protection of the laws," regardless of the rationale the state might offer to defend it. Exactly the same holds true when some "person or class of persons" is denied all access to legal protection from mistreatment in which the wrong charged takes the form of *discrimination* as such.

Because states are not constitutionally compelled to legislate against discrimination at all, and indeed usually legislate against it one step at a time, some may confuse the selective preclusion of legal

protection from discrimination in Amendment 2 with a state's quite familiar and constitutionally benign failure to remedy all forms of discrimination at once — a confusion that is unlikely with respect to selective preclusions of legal protection against wrongs like robbery or blackmail. States have no affirmative duty to enact or retain special laws for each group that might be victimized by discrimination, just as they may well have no affirmative duty to enact or retain laws directed at other forms of mistreatment. *See, e.g., DeShaney v. Winnebago County Social Servs. Dep't.*, 489 U.S. 189, 195-97 (1989). But it is quite another matter for a state absolutely to preclude, for a selected and specified set of persons, even the possibility of protection under any state or local law from an entire category of injurious conduct at least some of which is concededly wrongful rather than privileged. *Cf. id.* at 197 n.3.[1]

Of course, it seems unthinkable that a state would deny *all* its people protection against robbery or blackmail, because most people would certainly want such protection for themselves. From the selective denial to *some* persons of all protection under state or local laws against wrongs of that sort, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). So long as the state permits persons generally to seek redress for wrongs like robbery or blackmail through the enactment or enforcement of state or local laws, the Equal Protection Clause operates to guarantee that the state may not single out *particular* persons for a denial of that opportunity.

The same must be true for the wrong of discrimination. No one

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[1] This case does not involve a state's power to specify in its constitution that a particular category of acts is immune from liability under state and local law, regardless of the actor's motives or the characteristics of the person claiming injury. If a state's constitution were, for example, to include a rule of general applicability conferring upon every homeowner the right, or privilege, to use reasonable force to expel any guest who refuses repeated requests to leave, such a provision would not implicate the *per se* rule urged here, even though it would incidentally immunize some acts that might be deemed "discriminatory."

denies that "discrimination" as a category, whatever sort of prejudice it might reflect, includes genuine wrongs of the kind that Colorado, like every other state, has from time to time sought to prevent or remedy through its system of laws — its statutes, ordinances, regulations, common-law rules or other legal policies. And quite literally *any* characteristic — even one on the basis of which a state may properly deny benefits or impose disabilities in a wide variety of circumstances — can sometimes become the basis for prejudiced rather than privileged or justified deprivations. *See, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Yet Amendment 2 on its face creates, for selected and specified persons, a unique hole in the state's fabric of existing and potential legal protections against that wrong.[2] As such, it is a pristine illustration of what it means for a state to structure its legal system so as to "deny" to "person[s] within its jurisdiction the equal protection of the laws."

As far as the State of Colorado is concerned, this denial of protection is complete, for Colorado has used its *constitution* affirmatively to disable all lawmaking and law-enforcing processes within its borders — whether involving state legislation, a local ordinance, or the adoption or enforcement of a "policy" by state executives, administrators, or judges — that might otherwise provide legal protection from discrimination based on certain identified characteristics.[3] Embedding an otherwise unconstitutional

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[2] It is false to say, as some have, that Amendment 2 merely precludes "special rights" for homosexuals. Despite its mention of "quota preferences," Amendment 2 bears no resemblance to a requirement that all laws protecting some people from a particular category of wrongful treatment must extend equally to others who are similarly wronged. Amendment 2 is not comparable, for example, to a state constitutional provision requiring that all laws protecting homosexuals from discrimination or some other harm must extend equally to heterosexuals similarly harmed on account of *their* sexual orientation. On the contrary, Amendment 2 bars claims of discrimination based on someone's homosexuality but *not* claims of discrimination, or indeed special preferences, based on someone's heterosexuality. Amendment 2 on its face thus makes homosexuals *worse off* than heterosexuals — and worse off than hot dog vendors, optometrists, left-handed people, and every other group that remains free to claim discrimination, and even to seek preferential treatment, under state law.

[3] The amendment's prohibition is not limited to *enactments* that *explicitly*

deprivation in the state's constitution does nothing to lessen its sting. Indeed, as this case shows, it may sharpen it. Inserting a ban like that of Amendment 2 in a state constitution entails not just a repeal of, or a failure to enact or to enforce, laws protecting some citizens from discrimination, but rather puts the matter (and, in a sense, the group) beyond the reach of the state's system for making and enforcing laws. The possibility that even a state constitutional bar can in theory be lifted certainly offers no answer; if lifting a bar is the only way to remedy its inconsistency with the United States Constitution, that can

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mention "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." On the contrary, its prohibition expressly extends to the "enact[ment]" or "enforce[ment]" of any law or "policy" — even a pre-existing common-law rule — "whereby" any of the mentioned factors is made "the *basis* of...any...*claim* of discrimination." Thus, if a law, policy, or common-law rule forbidding, for example, arbitrary job dismissal or arbitrary eviction were to be enforced by a branch, department, agency, court or subdivision of the state in a manner that treated homosexuality as an "arbitrary" basis for dismissal or eviction, that enforcement decision would be one "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships" had become "the basis of...[a] claim of discrimination," and would thus be barred by Amendment 2.

But even if Amendment 2 were authoritatively construed by the Colorado Supreme Court as limited to measures explicitly mentioning such factors as homosexual orientation, it would still violate the Equal Protection Clause. For *other* persons are not relegated to laws protecting them from invidious discrimination only as *part* of some other, more generally defined, wrong but may (at least potentially) win the protection of laws that are directed at the invidious discrimination *as such*. That homosexuals might retain potential access, despite Amendment 2, to *part* of the state's system of laws when the invidious discrimination by which they are victimized overlaps with some other distinct wrong identified by the state hardly changes the fact that Amendment 2 selectively, and thus unequally, deprives them of the "protection of the laws" of Colorado.

And even if the Colorado Supreme Court construed the amendment as limited to statutes, ordinances and regulations, it would still violate the Equal Protection Clause. For Amendment 2 would still mean that some persons would have access only to *common-law*-based legal protections from discrimination, and never to any anti-discrimination protections under the state's *positive laws*, either extant or future. This obviously constitutes a denial, to those persons, of the "*equal* protection of the *laws*," even if it falls short of denying those persons *all* legal protection.

hardly be a ground for leaving it in place.

The fact that many of the harmful acts of discrimination that Amendment 2 places beyond the reach of any remedy under state and local laws would be *private* rather than governmental does not render the state action represented by *Amendment 2 itself* any less a violation of the Equal Protection Clause. "Equal protection *of* the laws" is not limited to equal protection *from* the laws (i.e., from laws, or other official acts, that themselves discriminate in some narrow and concrete way against particular persons or categories of persons). Rather, the Equal Protection Clause requires a regime that gives all persons equal access at least to the possibility of protection under the laws of the state from the wrongs that may befall them — whether such wrongs as robbery or such wrongs as discrimination, and whether privately or officially inflicted.[4]

Rendering some persons facially ineligible for the protection of the state's laws from a certain type of wrong, as Amendment 2 does,

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[4] As to *governmental* actions disadvantaging individuals on the basis of their homosexuality without rational justification— for instance, refusals by municipalities to provide gay men or lesbians with standard police protection in response to "911" calls — Colorado courts would obviously have to recognize claims challenging such actions as discrimination unrelated to any legitimate purpose, and therefore as conflicting with the federal Equal Protection Clause. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In recognizing such federal constitutional claims, the state's courts, even if violating Amendment 2 by "adopt[ing] or enforc[ing] any . . . policy whereby homosexual . . . orientation . . . [had become] the basis of . . . [a] claim of discrimination," would simply be obeying the United States Constitution, as the Supremacy Clause plainly obliges them to do. However, Amendment 2 *would* prevent Colorado's courts, agencies, and legislative bodies from promulgating or enforcing *state* or *local* rules or policies to redress such governmental violations by providing relief *beyond* that required by the Supremacy Clause — relief based, for example, on Denver Police Dept. Reg. RR-128 ("Members [must] be of service to anyone . . . in danger . . ., regardless of race, . . ., gender, age or *sexual orientation*")(italics added). Because the victims of governmental actions discriminating on bases *other* than homosexuality are not similarly denied access to the possibility of additional *state-law* redress, Amendment 2 deprives gay, lesbian, and bisexual victims of *state and local* discrimination of equal protection, just as it deprives gay, lesbian, and bisexual victims of *private* discrimination of equal access to legal remedies, and thus to the equal protection of the laws.

is different in character from passing generally applicable laws that merely burden the practice of activities in which such persons tend to engage, or create extra (and potentially insuperable) hurdles that must be cleared prior to the enactment of categories of legislation that those persons would tend to favor. A state constitution that prohibits local rent control ordinances, for example, or even one that bars rent control legislation entirely — perhaps proclaiming that the privilege of landlords and tenants to agree upon whatever rent they wish is an aspect of their freedom of contract under the state constitution — might be said to injure tenants more than landlords, or to disadvantage renters more than owners. But such a differential disadvantage, provided it meets a test of rationality, does not work a deprivation of the equal protection of the laws. To make the situation analogous to Amendment 2, one would have to posit a state constitution that, for example, prohibits all arms of state and local government from enacting or enforcing laws whereby individuals could claim that they have suffered discrimination (that is, unjustifiably harmful differences in treatment) — whether at the hands of employers, shopkeepers, hospitals, or anyone else — by virtue of the fact that they rent, rather than own, their homes.[5]

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[5] Accordingly, Amendment 2's violation of the Equal Protection Clause cannot be overcome by the claim that it applies equally to all persons in Colorado in that it simply identifies a distinctive type of wrong — mistreatment motivated by anti-homosexual prejudice — and withdraws that type of wrong, as to *everyone* in Colorado, from the prohibitory reach of any current or future state or local anti-discrimination measure. That claim is at least as false of Amendment 2 as it would be of the anti-tenant provisions discussed above; indeed, Amendment 2 applies *only* to the "class of persons" whose "orientation, conduct, practices or relationships" makes them vulnerable to invidious discrimination based on homosexuality.

Moreover, whether "homosexual . . . orientation, conduct, practices or relationships" are regarded as immutable or instead as involving personal choice — comparable to the choice of renting a dwelling — Amendment 2 precisely parallels the hypothetical state constitutional provision barring enactment or enforcement of any measure to remedy the distinctive harm of mistreatment motivated by anti-tenant prejudice. The fact that the persons singled out for a denial of equal protection of the laws might not constitute a fixed, immutable class, all of whose members are determined in advance, is irrelevant to the argument made in this brief, and goes at most to the separate issue of whether the persons so designated constitute a suspect class warranting heightened scrutiny.

Nor is the equal protection violation diminished if the conduct that triggers the state constitution's preclusion of anti-discrimination measures is conduct that, unlike renting a home, the state might rationally condemn or even outlaw. Imagine, for instance, a state constitutional provision singling out for such preclusion those persons who have been convicted of gambling in violation of the state's laws, and who refuse to change their behavior. Even though such a provision denies protection only to persons whose conduct the state has unquestionable authority to ban, a constitutional amendment permanently stripping those persons of any ability to claim protection under the state's laws from one or more forms of wrongful treatment (as distinguished from treatment that inflicts only a harm related to the evil that the law condemns in their conduct) would deprive them of the equal protection of the laws. The state is free to proscribe gambling and to impose fines or jail sentences for such conduct, and perhaps even to make disenfranchisement part of the punishment for the offense. But it is not free to put gamblers — even those who are serving time in prison (*see, e.g., Farmer v. Brennan*, 114 S.Ct. 1970, 1976-77 (1994))— beyond the current or potential reach of all state-law protection from physical assault, discriminatory denial of needed medical treatment, or any other unjustified infliction of harm that may be motivated by the victim's status as a gambler. The hospital that decides it will deny convicted gamblers emergency care, for example, may not be placed absolutely beyond the reach of claims, pursuant to existing or future laws enacted by the state or its subdivisions, brought on the premise that such selective denial of medical treatment constitutes invidious discrimination. The hospital has every right to combat the enactment of such laws as unnecessary or unwise, and to resist claims of discrimination brought under such laws by trying to show that its denials of service were justified. But the state denies equality under the law if it decides in advance that being a gambler, even a convicted gambler, renders a person ineligible for the protection from an entire category of wrongful conduct that might otherwise be available through the state's system for making and enforcing laws.

The reason, quite simply, is that the command of equal protection extends to every person within the state's jurisdiction, regardless of what the person might have done, and certainly regardless of what the person might be inclined to do. Outlawry may

be consistent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment. *See, e.g., Green v. United States*, 356 U.S. 165, 171 (1958) ("the severe remedy of outlawry . . . was never known to the federal law"); *Communist Party v. SACB*, 367 U.S. 1, 82, 88 (1961). It is of course true that Amendment 2 does not literally declare any class of citizens to be *outlaws*; that is, it does not completely strip any set of persons of *all* legal rights, thereby placing them in all respects outside the law. But this simply means that it does not deprive its victims of *all* legal protection. It does, however, deprive them of *equal* protection, and it is this deprivation that should be deemed fatal under the Equal Protection Clause.

Implicit in this Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), was an understanding that selective preclusion of access to state law for redress from private discrimination would be inconsistent with the Fourteenth Amendment's command of equality before the law. The Court took it for granted that there were settings in which private individuals could lawfully draw distinctions even based on race, but assumed at the same time that inns and certain other private institutions had a state-law duty to serve all without discrimination. And the Court presumed that private violations of that duty would, for *all* citizens and not just for some, be "properly cognizable by the laws of the state, and [would] presumably [be] subject to redress by those laws until the contrary appears." *Id.* at 24. It was the failure of Congress to limit its enforcement legislation to situations in which the contrary *did* appear — situations in which a state had selectively precluded "resort to the laws of the state for redress," *id.* at 17 — that invalidated the congressional enactment then before the Court. Thus, although the *Civil Rights Cases* obviously did not present the Court with any measure remotely analogous to Amendment 2, the premises underlying the Court's opinion support the argument advanced in this brief that the very text and logic of the Equal Protection Clause necessarily render Amendment 2 unconstitutional.

The early history of the interpretation of the Equal Protection Clause also reinforces the conclusion that the Fourteenth Amendment must prohibit measures that selectively foreclose access to the protection of the state's laws. In the years immediately following

passage of the Fourteenth Amendment, during legislative debates regarding the reach of the Equal Protection Clause of Section 1 and of the Enforcement Clause of Section 5, there was wide agreement that, if any state were systematically to withhold the protection of its laws from any group, such selective refusal to provide legal protection would constitute a "denial" of the equal protection of the laws.[6]

Amendment 2, of course, is far more offensive to equal protection than any mere omission or refusal to protect; it embodies a deliberate commitment, embedded in the fundamental law of the State of Colorado, to make the full reach of the state's system for making and enforcing laws and regulations available only to *some* of

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[6] *See, e.g.*, Cong. Globe, 41st Cong., 2d Sess. 3611 (1870) (statement of Senator Pool) (noting that the Fourteenth Amendment's command that a state not "deny to any person . . . the equal protection of the laws" included the obligation not to "deny by acts of omission, by a failure to prevent its own citizens from depriving by force of any of their fellow citizens of these rights"); Cong. Globe, 42nd Cong., 1st Sess. 334 (1871) (statement of Representative Hoar) ("[I]t is an effectual denial by a state of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."); *id.* at App. 182 (statement of Representative Mercur) (explaining that the word "deny" as used in the Fourteenth Amendment Equal Proctection Clause "means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the state by the Constitution"); *id.* at 501 (statement of Senator Frelinghuysen) ("A state denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A state denies protection as effectively by not executing as by not making laws."); Cong. Rec., 43rd Cong., 1st Sess. 412, 414 (1874) (statement of Representative Lawrence) (noting that the Civil Rights Act of 1866, which the Fourteenth Amendment essentially constitutionalized, and the Enforcement Act and the Ku Klux Klan Act, adopted to enforce the Fourteenth Amendment, "[a]ll . . . proceed upon the idea that if a state omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment," for the word "deny" includes "an omission by any state to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A state which omits to secure rights denies them."). *See also* Letter from Justice Bradley to Judge Woods of March 12, 1871 (on file with the New Jersey Historical Society, Newark, New Jersey) ("[D]enying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. . . .").

the state's people and not to selected and specified others. The historical record, although strongly suggestive of the conclusion that such a commitment would always have been deemed incompatible with the Equal Protection Clause, contains no direct encounter with a measure quite like Amendment 2. The pages of the United States Reports likewise contain nothing that seems entirely apposite. But if the question posed by Amendment 2 does not fit neatly into any of the established areas of this Court's Equal Protection Clause jurisprudence dealing either with suspect classifications or with fundamental rights, the reason is that Amendment 2 is quite literally unprecedented: Between the adoption of the Fourteenth Amendment and the enactment of Amendment 2, this Court has never been presented with a decision by any state explicitly to deny selected persons access to the protection of its laws from a whole category of wrongful conduct. For a state to do that is to "deny to [those persons] . . . the equal protection of the laws."

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the judgment below.

Respectfully submitted,

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Table of Contents

Page

Table of Contents i

Table of Authorities iii

Interest of Amici Curiae 1

Summary of Argument 4

Argument

I. Amendment 2 unconstitutionally infringes the fundamental right to participate equally in the political process 8

A. The Constitution forbids attempts to degrade a group of voters' influence on the political process as a whole 8

B. The Constitution forbids sophisticated as well as simple-minded attempts to degrade a group's political power 10

C. This Court's one-person, one-vote cases also support an understanding of the right to vote that embraces an equal opportunity to participate in governmental decisionmaking 15

II. Under the circumstances of this case, closing Colorado's courts to claims of discrimination constitutes an independent abridgment of the fundamental right to participate in the political process 17

III. Constitutional provisions closing the ordinary political and judicial fora to a particular group of citizens seeking protection of their right to equal treatment are subject to strict scrutiny, because they have the effect of making the affected group a "suspect class" 22

A. The suspect classifications presently recognized reflect past pervasive denials of legal protection to particular disfavored groups 22

B. Depriving a group of the benefit of equal protection by prohibiting courts and legislatures from rectifying discrimination makes the group a suspect class 25

C. Amendment 2 creates a discrete and insular minority in Colorado whose members are uniquely prohibited from seeking enforcement of the Fourteenth Amendment in their own State 26

Conclusion 28

Table of Authorities

Pages

Cases

Abate v. Mundt, 403 U.S. 182 (1971) 9

Allen v. State Board of Elections, 393 U.S. 544 (1969) 14

Avery v. Midland County, 390 U.S. 474 (1968) 16

Board of Estimate v. Morris, 489 U.S. 688 (1989) 15, 16

Bounds v. Smith, 430 U.S. 817 (1977) 17

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ..... 18, *passim*

Cooper v. Aaron, 358 U.S. 1 (1958) 27

Dandridge v. Williams, 397 U.S. 471 (1970) 23

Davis v. Bandemer, 478 U.S. 109 (1986) ..... 5, *passim*

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) 17

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 11, 12, 13

Graham v. Richardson, 403 U.S. 365 (1971) 23

Gray v. Sanders, 372 U.S. 368 (1963) 9

Howlett v. Rose, 496 U.S. 356 (1990) 19

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 13

Hunter v. Erickson, 393 U.S. 385 (1969) 10, 16

Korematsu v. United States, 323 U.S. 214 (1944) 13, 23

Lane v. Wilson, 307 U.S. 268 (1939) 6, 11

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991) 17

Loving v. Virginia, 388 U.S. 1 (1967) 23

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 23

NAACP v. Button, 371 U.S. 415 (1963) ..... 6, *passim*

O'Brien v. Skinner, 414 U.S. 524 (1974) 20

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 14

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 24

Reynolds v. Sims, 377 U.S. 533 (1964) ..... 6, *passim*

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) 25

Scott v. Sandford, 60 U.S. 393 (1857) 24

Shaw v. Reno, 113 S. Ct. 2816 (1993) 8, 12

Shelly v. Kraemer, 334 U.S. 1 (1948) 21

Testa v. Katt, 330 U.S. 387 (1947) 22

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 24, 26

United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), aff'd, 304 F.2d 583 (5th Cir.), aff'd 371 U.S. 37 (1962) 11

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 18

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) 10

Whitcomb v. Chavis, 403 U.S. 124 (1971) 9

White v. Regester, 412 U.S. 755 (1973) 11

Zobel v. Williams, 457 U.S. 55 (1982) 18

Constitutional and Statutory Provisions

U.S. Const. art. VI 19, 26

U.S. Const. amend. XIV ..... 5, *passim*

Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c (1988) 14

Ala. Const. Amend. No. 132 (1957), repealed by Ala. Const. Amend. No. 406 (1982) 12

Colo. Const. Art. II, § 25 21

Other Materials

28 C.F.R. § 51.13(j) (1994) 14

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W.S. Holdsworth, History of English Law (1916) 24

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No. 94-1039

In The
Supreme Court of the United States
October Term, 1994

ROY ROMER, *ET AL.*,

Petitioners,

v.

RICHARD G. EVANS, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

Brief for *Amici Curiae* Anti-Defamation League, Asian American Legal Defense and Education Fund, Japanese American Citizens League, NAACP Legal Defense and Educational Fund, Inc., National Counsel of La Raza, People for the American Way, and Puerto Rican Legal Defense and Education Fund

Interest of *Amici Curiae*

Anti-Defamation League

The Anti-Defamation League (ADL) is one of the oldest civil rights organizations in the United States. It was founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups and religions. As set forth in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair

discrimination against and ridicule of any sect or body of citizens." For more than eighty years, ADL has been active in the fight against discrimination in employment, housing, education and public accommodations.

Asian American Legal Defense and Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund (AALDEF) is a civil rights organization that addresses critical issues facing Asian Americans through community education, advocacy, and litigation involving immigrants' rights, voting rights, labor and employment rights, and environmental justice. AALDEF also represents victims of anti-Asian violence and Japanese Americans who were incarcerated in U.S. camps during World War II. AALDEF supports the fundamental right of all persons to equal access and participation in the political process.

Japanese American Citizens League

The Japanese American Citizens League (JACL), founded in 1929, is the oldest and largest Asian Pacific American civil rights organization in the nation. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were interned in concentration camps during World War II. The JACL has also worked to combat discrimination on the basis of race, ethnicity, religion, gender, and sexual orientation, to reduce the incidence of hate crimes, and to protect the right of all persons to equal participation in the political process.

NAACP Legal Defense and Educational Fund, Inc.

The NAACP Legal Defense and Educational Fund, Inc. is a national civil rights legal organization that has for more than forty years litigated on behalf of African Americans and others seeking protection from status-based discrimination and harassment based on the exercise of constitutional rights.

Important LDF cases in the area include Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)(invalidating ordinance authorizing arbitrary prior restrainst on political protest); Garner v. Louisiana, 368 U.S. 157 (1961) (invalidating convictions of sit-in protesters for "disturbing the peace" where only conduct was courteous refusal to give up seats in "white" section of lunch counter); Brown v. Board of Education, 347 U.S. 483 (1954) (overturning principle that "separate but equal" treatment of different races does not violate the Equal Protection Clause).

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit corporation dedicated to reducing poverty and discrimination, and improving life opportunities for Hispanic Americans. NCLR is the largest constituency-based national Hispanic organization, and represents nearly 200 formal affiliates — local community-based hispanic organizations — who together serve more than two million Hispanics annually in 38 states, Puerto Rico and the District of Columbia. One of NCLR's primary policy goals is to promote and strengthen civil rights enforcement laws in the area of employment, education, affirmative action, and voting rights.

People for the American Way

People for the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our Nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members across the country, including Colorado. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of

bias, injustice and discrimination. The instant appeal is of particular importance to People For because the Colorado Supreme Court's decision properly rejected the unacceptable concept that gay men and lesbians are second class citizens who may be excluded from this country's political processes and denied its legal protections. It is vitally important to People For that this Court affirm that decision and the fundamental principle that all persons, including gay men and lesbians are entitled to the equal protection of the law.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund (PRLDEF) was founded in 1972 to protect and ensure the civil rights of Puerto Ricans and other Latinos. PRLDEF is committed to the equal protection of the laws for all persons and strongly opposes discrimination against lesbian, gay and bisexual people, including any attempt to restrict political participation on the basis of sexual orientation.

The parties have consented to the filing of this brief; their letters to that effect have been filed separately in this Court.

Summary of Argument

The rhetoric of "no special rights," which formed much of the political campaign to pass Amendment 2 and is at the center of petitioners' arguments to this Court, is an obfuscation. This Court should look beneath the specious claim that Amendment 2 advances a populist conception of equal treatment to see this legislation as it is: Amendment 2 walls off the political and judicial fora of the State of Colorado from its gay citizens, depriving them in a particularly flagrant fashion of the equal protection of the laws. No other group of citizens in Colorado is prevented from seeking, at any level of government, to pass legislation prohibiting acts of private discrimination or public hate. No other group of persons in Colorado is prohibited from

using the State's courts to vindicate state and federal rights. Had Colorado's legislature or voters adopted a constitutional amendment reading: "The Equal Protection Clause of the Fourteenth Amendment does not apply to lesbians, homosexuals or bisexuals in this State unless reenacted by a subsequent amendment to this State's Constitution" *amici* venture to suppose that this Court would unanimously strike it down. That is the practical effect of Amendment 2, though couched in a disingenuous language of "no special rights." Strict judicial scrutiny is warranted, and we submit that the proper result of that scrutiny is the result reached by the Colorado Supreme Court.

Amendment 2, by prohibiting all of the State's legislatures and administrative agencies from outlawing violations of gay people's civil rights, infringes the most important political right in any democratic society—the right to participate equally with all other citizens in the political process. This right, as the Court's decisions have repeatedly recognized, is not limited to the right to cast a ballot and have it counted. Electoral schemes designed to cancel out the voting strength of particular groups are constitutionally suspect even if no voter is disfranchised, if a group of voters' influence on the political process "as a whole" is consistently degraded. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion). Though political vote dilution cases are rare, Amendment 2 presents a textbook example. In response to a few limited political successes by gay voters, Colorado has reorganized its entire governmental structure in order to ensure that no elected official anywhere in the State will be responsive to a primary political concern of gay voters.

This attempt to reverse successes at the ballot box is not insulated from constitutional scrutiny because it took the form of a relocation of electoral decisionmaking from the local to the statewide constitutional level. This Court has repeatedly held for more than thirty years that such restructurings, if undertaken for discriminatory purposes, may violate—depending on the precise factual context—the Fourteenth and Fifteenth

Amendments or the Voting Rights Act. Petitioners' windy evocations of the State's plenary authority to reorganize its governmental structures are punctured by a single warning this Court issued long ago: "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

Meaningful political participation, guaranteed by the Fourteenth Amendment to all citizens equally, means the opportunity to seek through electoral and governmental processes the vindication of one's rights and the achievement of one's interests. Amendment 2 singles out gay people in Colorado and disables them from using the political process in ways open to all other voters. Whatever the subterfuge employed, and whatever the populist rhetoric accompanying the action, this result is repugnant to the Federal Constitution.

Amendment 2 similarly attempts, in a particularly flagrant fashion, to deny equal protection of the laws through the agency of the courts. Not only does the legislation purport to close the State courts to claims for the vindication of federal rights—a result in conflict with the clear constitutional commandments of this Court stretching back more than half a century—it also prohibits the State's courts from redressing wrongs done to State citizens against the laws of the State, if those citizens were publicly or privately wronged as a result of discrimination against gay people. This result violates First Amendment expression and association rights just as surely as Virginia's equally meretricious restrictions on civil rights litigation invalidated by this Court in *NAACP v. Button*, 371 U.S. 415 (1963). Such widespread denial of equal access to the courts is nothing more than an invitation to arbitrary and capricious discriminatory conduct; as such it violates the Equal Protection Clause.

Amendment 2's interferences with equality in political and judicial process are each independently sufficient to require

invalidation. But *amici* believe that the Court should express to the nation the full breadth of the constitutional impropriety in this case. What Colorado has done is to create a discrete and insular minority within its population, marking off a certain group and denying that group its rights in the political process and the equal protection of the laws. Historical denial of the formal protections of the law is the characteristic that distinguishes those social groups which are treated as "suspect classifications" for equal protection purposes. African-descended Americans were denied all access to the Federal courts before the Civil War, as aliens, women, and illegitimate offspring were traditionally denied legal protection by the common law to varying degrees and under varying circumstances. These are the classifications which the Court has found to trigger heightened scrutiny when legislatures disadvantage particular groups. The Court has never held that the class of suspect classes is closed. *Amici* submit that Amendment 2, by formally denying equal access to legal protections, makes the object of its hostility into a suspect classification. Strict scrutiny should be accorded to Amendment 2 because it attempts to reduce gays to the status of a powerless discrete and insular minority. The protection of our Constitutional ideals demands no less. Our own history, and the bloody course of the twentieth century, have taught us all too well what happens when minorities are denied legal protection—sooner or later individuals' very existence is at stake. The process of dehumanization begins with laws like this one. The true measure of our commitment to equality is our willingness to intervene at the first step, before our own people begin walking that fatal path.

Argument

I. Amendment 2 unconstitutionally infringes the fundamental right to participate equally in the political process

Over the past three decades, this Court has made clear in a variety of contexts that the constitutional protection of the right to vote does more than guarantee all qualified citizens the right to enter the voting booth and cast a ballot for the candidates of their choice. The "constitutional 'right' to vote," *Shaw v. Reno*, 113 S.Ct. 2816, 2819 (1993), involves a constellation of interests—an entitlement to participate in the formal election process by casting a ballot and having it counted; the use of fair rules to determine election winners; and the ability to influence post-election decisionmaking by elected representatives. See Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1709-20 (1993). Amendment 2 clearly violates the right to vote as currently understood.

A. The Constitution forbids attempts to degrade a group of voters' influence on the political process as a whole

Electoral schemes that "operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population ... raise a constitutional question." *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (internal quotation marks omitted). Even if a politically identifiable group remains free to go to the polls and cast its ballots for the candidates and propositions it prefers, the members' right to vote may nonetheless be unconstitutionally diluted "when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Id.* at 132 (plurality opinion). Moreover, this Court's

equal protection jurisprudence makes clear that the equal protection clause protects all groups of voters, whether they are defined by reference to a pre-existing status or simply in terms of their political affiliation and interests. *See, e.g., Abate v. Mundt*, 403 U.S. 182, 187 (1971) (upholding a plan in the absence of any "built-in bias tending to favor particular political interests or geographic areas"); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (condemning apportionment plans "conceived or operated as purposeful devices to further racial or economic discrimination"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that the Constitution requires "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (requiring that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit").

Political vote dilution under the *Davis v. Bandemer* standard is exceedingly rare. The mere fact that a politically salient group consistently loses at the polls is not enough, since "the power to influence the political process is not limited to winning elections." 478 U.S. at 132. Normally, even members of the losing bloc have an equal opportunity to participate in the political process as a whole because normally, "the candidate elected will [not] entirely ignore the interests of those voters [who voted for a losing candidate]." *Id.*; *see also id.* at 152-53 (O'Connor, J., concurring in the judgment).

But Colorado's Amendment 2 presents that rare case of unconstitutionality. Amendment 2 is designed precisely to degrade a group's influence on the political process as a whole and, if allowed to stand, will have exactly that effect. Petitioners' brief and the testimony of the founders of Coloradans for Family Values—who were responsible for drafting and promoting Amendment 2—are admirably candid on this point. The impetus for Amendment 2 was the limited

success gays, lesbians, bisexuals, and their political allies had achieved through Colorado's existing political processes. *See* Brief for Petitioners at 5-6; Testimony of Wilford G. Perkins, Tr. at 736; Testimony of Anthony N. Marco, Tr. at 832-33, 837, 839, 846, 852. Amendment 2 was designed to roll back the gains gays had already achieved—before the State Legislature, in local legislative bodies, and through the persuasion of executive officials—and to ensure that gays would not be able to achieve any future political gains except through the extraordinary mechanism of a state constitutional amendment. Amendment 2 ensures that elected officials in Colorado not only will, but *must* "entirely ignore," *Bandemer*, 478 U.S. at 132, the interests of the group of voters who seek civil rights for gays, lesbians, and bisexuals, because elected officials are absolutely disempowered from responding to these constituents' concerns. Petitioners point to no other particular group of Colorado voters whose influence on the political process is similarly degraded.

B. The Constitution forbids sophisticated as well as simple-minded attempts to degrade a group's political power

A central syllogism underlying petitioners' argument goes something like this: the cases on which the Colorado Supreme Court's decision ultimately rests—*Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)—were about racial discrimination in the political process; this case is not about racial discrimination; therefore this case is not about the right to participate fully in the political process.

Simply to state the syllogism is to expose the flaw in petitioners' position. That this case does not involve racial discrimination says nothing about whether it involves discrimination in the political process. Petitioners have got the argument exactly backwards. This Court's cases involving racial discrimination with respect to voting are relevant, not to

establish that discrimination against homosexuals is the same as discrimination against African Americans, but rather to shed light on the scope of the right the Colorado Supreme Court correctly located within the Fourteenth Amendment: that "the political processes ... [be] equally open to participation by the group in question." *White v. Regester*, 412 U.S. 755, 766 (1973); *see Davis v. Bandemer*, 478 U.S. at 137 (plurality opinion). The reason why so many of the salient cases in this area involve racial discrimination is that, before the upsurge of anti-gay sentiment that produced Amendment 2 and its counterparts in other jurisdictions, racial and ethnic minorities were the usual targets of this kind of sophisticated political degradation.

As this Court emphasized in *Reynolds v. Sims*, "[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" 377 U.S. 533, 563 (1964) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). *Reynolds*—which was not a case about racial discrimination in any form—expressly relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), for its understanding both of what constitutes "sophisticated" discrimination respecting the right to vote, *Reynolds*, 377 U.S. at 563, and to explain why federal judicial intervention is necessary when a state manipulates its governmental structure to disempower a discrete group of voters, *id.* at 566. *Gomillion* is similarly illuminating in understanding why Amendment 2 represents unconstitutional discrimination.

Tuskegee was (and is) a majority-black municipality within majority-black Macon County, Alabama. When, in the mid-1950's, Tuskegee's black community began to express its determination to participate in the political process, Alabama's white majority responded in three ways. First, the Macon County Board of Registrars engaged in a series of evasive maneuvers designed to prevent African Americans from registering to vote. *See United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371

U.S. 37 (1962) (per curiam). Second, through a statewide referendum, Alabama adopted a constitutional amendment permitting the state to abolish Macon County altogether "if the uppity Negroes there continued pestering for the vote." Bernard Taper, Gomillion v. Lightfoot: Apartheid in Alabama 51 (New York: McGraw-Hill 1962). *See* Ala. Const. Amend. No. 132 (1957), *repealed* Ala. Const. Amend. No. 406 (1982). Third, the Alabama Legislature passed Local Act 140, which redrew Tuskegee's municipal boundaries "to remove from the city all save only four or five of its 400 Negro voters [as well as several hundred other African American citizens] while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341.

In *Gomillion*, this Court held that Act 140 could be challenged under the Fifteenth Amendment, which protects only the right to vote against racial discrimination.[1] If "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," the Tuskegee gerrymander would be unconstitutional. *Id.* at 347. Although the Court acknowledged a long line of cases recognizing the states' general prerogative to organize their local governments as they saw fit, it held that it was "inconceivable" that the Constitution "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.* at 345. The broad principle to be derived from *Gomillion* is that the Constitution protects the right to vote from state efforts to manipulate political structures to deny voters "their theretofore enjoyed voting rights."

1. In *Shaw v. Reno*, 113 S.Ct. at 2825-26, the Court stated that the claim raised in *Gomillion* would have been actionable under the Fourteenth Amendment as well. *See also Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

Suppose, though, that the Colorado Legislature were to pass a statute de-annexing the neighborhoods of Denver which it concluded were heavily populated by gay, lesbian, or bisexual voters. If this Court were to conclude that the sole purpose of the statute was to ensure that these groups would have no influence over Denver's municipal government—although they might still be subject to Denver's police power, *cf.* Tr. of Oral Arg. at 7, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (the black community remained within Tuskegee's police power jurisdiction even after the de-annexation)—it seems inconceivable that the Court would uphold such a statute. Such a de-annexation, with its ensuing exclusion from a pre-existing political community, would be every bit as odious as the Exclusion Order challenged in *Korematsu v. United States*, 323 U.S. 214 (1944). Contrary to Colorado's suggestion, see Brief for Petitioners at 16, *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), would provide no more of a shield for this invidious political expulsion than it did for the exclusion of blacks in Tuskegee.

The "inescapable effect" of Amendment 2 is not far removed from this hypothetical or the Tuskegee experience. Like Tuskegee's black citizens, the gays, lesbian, and bisexual citizens of Colorado alarmed the majority with their insistence on effective participation in the political process. *See, e.g.*, Testimony of Anthony N. Marco at 839 (claiming Amendment 2 was "necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease"). Like Alabama, Colorado responded with an unprecedented reorganization of its political processes to ensure that local political activity would be rendered ineffectual. States "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and calling Amendment 2 an allocation of authority among political subdivisions cannot disguise the fact that its purpose and effect are to deny gays, lesbians, and bisexuals the ability to pursue their interests through the regular political process.

That the relocation of electoral decisionmaking from the local to the statewide level (one of the intended effects of Amendment 2, *see* Brief for Petitioners at 5-6, 47-48) implicates voting finds further support in this Court's decisions under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. That provision requires specified jurisdictions to seek federal preclearing before implementing any changes "with respect to voting." While these cases involve a statutory, rather than a constitutional, cause of action, their focus on the scope of the right to vote is nonetheless helpful.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), for example, the Court held that a change from districted to at-large elections for a county board of supervisors required section 5 preclearance. The Court explained: "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds v. Sims*, 377 U.S. at 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen*, 393 U.S. at 569. In more general terms, *Allen* recognizes that "changes in the composition of the electorate that may vote for candidates for a given office" affect the right to vote. *Presley v. Etowah County Commission*, 502 U.S. 491, 503 (1992).

Amendment 2 works a similar change in the composition of the electorate. Prior to the amendment, gays, lesbians, and bisexuals along with their political allies in local Colorado jurisdictions could hope to enact antidiscrimination measures. (In fact, the Boulder ordinance was adopted by popular referendum.) Now, however, voters are forbidden from adopting such measures in local elections; only a statewide referendum adopting a new constitutional amendment could authorize such legislation. *Cf.* 28 C.F.R. § 51.13(j) (1994) (requiring preclearance of "[a]ny change affecting the necessity of ... offering issues and propositions by referendum").

C. This Court's one-person, one-vote cases also support an understanding of the right to vote that embraces an equal opportunity to participate in governmental decisionmaking

As we have already pointed out, *Reynolds v. Sims* involved no allegation of racial discrimination. The Court's recognition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" thus does not depend on the presence of a racially discriminatory purpose or effect. Contrary to the suggestion in petitioners' brief, the impermissible dilution in *Reynolds* did not stem from the underweighting of the plaintiffs' votes in popular elections; there was no claim that the plaintiffs were less able than other voters to elect the representatives of their choice. Rather, the grievance centered on the fact that, *within the legislative process*, the influence enjoyed by residents of the Birmingham, Mobile, and Gadsden suburbs was underweighted relative to the influence enjoyed by voters in other parts of the state. Thus *Reynolds* recognizes that the right to vote protected by the Fourteenth Amendment extends beyond Election Day.

This consistent understanding was again evident in the Court's most recent quantitative dilution case, *Board of Estimate v. Morris*, 489 U.S. 688 (1989). There, the Court held that New York City's longstanding form of municipal governance violated the equal protection clause because the Board of Estimate—a governmental body with sweeping executive and legislative powers—was chosen in a fashion that gave residents of Brooklyn, the city's most populous borough, proportionately less influence on the Board's decisionmaking than voters from smaller boroughs enjoyed. "[I]n this country," *Morris* explained, "'each and every citizen has an inalienable

right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be." *Id.* at 693 (quoting *Reynolds*, 377 U.S. at 365).

Similarly, *Hunter v. Erickson* relies on the one-person, one-vote cases, rather than the Court's race-discrimination jurisprudence, to explain the way in which the Akron charter provision injured the city's African American voters. When *Hunter* invoked *Reynolds* and *Avery v. Midland County*, 390 U.S. 474 (1968)—declaring that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size," 393 U.S. at 393—it did so, *not* to explain that the Akron charter amendment affected African Americans (which it had already decided, *id.* at 390-91),[2] but rather to point out that their injury lay in the impairment of their ability to participate equally in the political process.

So too in this case. Amendment 2 singles out the gay, lesbian, and bisexual community and tells its members that they alone—among all Coloradans—are disabled from seeking antidiscrimination laws and policies through the normal political processes of government. This unique disempowerment violates the Fourteenth Amendment's requirement that the political process be equally open to all voters.

2. In this case, there is no need to conduct any sort of purpose inquiry to see that gays, lesbians, and bisexuals are the target of the Amendment. Amendment 2 does not contain the rhetorical fig leaf of neutrality—prohibiting, for example, discrimination based on "sexual orientation" generally—but explicitly singles out gays, lesbians, and bisexuals. Thus, heterosexual voters remain free to seek local ordinances, and state statutes and executive policies protecting them from discrimination on the basis of *their* sexual orientation.

II. Under the circumstances of this case, closing Colorado's courts to claims of discrimination constitutes an independent abridgment of the fundamental right to participate in the political process

The Colorado Supreme Court held that Amendment 2 closes the State's courts to claims of discrimination brought by gays, lesbians, or bisexuals: "Amendment 2 alters the political process so that a targeted class is prohibited from obtaining ... judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment." *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994) (*Evans II*).

Litigation—particularly litigation by an identifiable, unpopular minority group seeking to vindicate its right to fair treatment—is itself a form of political activity protected by the First and Fourteenth Amendments:

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

NAACP v. Button, 371 U.S. 415, 429-30 (1963); *see Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 528 (1991) (plurality opinion) ("We have long recognized the important political and expressive nature of litigation"); *cf. Bounds v. Smith*, 430 U.S. 817, 828 (1977) (noting "the fundamental constitutional right of access to the courts").

Just as "association for litigation may [have been] the most effective form of political association" for African Americans in

Virginia in the early 1960's—when "the militant Negro civil rights movement [had] engendered the intense resentment and opposition of the politically dominant white community of Virginia," *NAACP v. Button*, 371 U.S. at 431, 435—so too, litigation may today be an especially effective form of political association for gays in light of the state's concession that their civil rights movements engendered the intense resentment and opposition of the politically dominant straight community in Colorado that produced Amendment 2. *See, e.g.*, Testimony of Anthony N. Marco, Tr. at 846 ("The primary intention [of Coloradans for Family Values in drafting Amendment 2's language] was to resist statewide aggression on the part of gay militants").

But as the Colorado Supreme Court interpreted Amendment 2, that avenue of political association is barred. Assuming arguendo that discrimination on the basis of sexual orientation need withstand only rational relationship scrutiny,[3] gays are nonetheless protected by the Equal Protection Clause's ban on arbitrary or irrational treatment. As this Court explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), even when rational relationship scrutiny is appropriate, States

> may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as a bare ... desire to harm a politically unpopular group—are not legitimate state interests.

Id. at 446-47 (internal quotation marks and citations omitted); *see also Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

3. We argue in the next part of this brief that Amendment 2 *creates* a suspect class.

Amendment 2 permits precisely such denials of equal protection. Suppose, for example, that a Colorado municipality passed an ordinance that required any gay person entering the town to register with the local police department. Or suppose that a community college with otherwise open enrollment refused to allow lesbians to participate in physical education classes. Such treatment would almost certainly violate the Equal Protection Clause. It is impossible to imagine a legitimate state interest that these policies could serve; they would seem either completely irrational or motivated solely by a desire to injure a politically unpopular group.[4]

Litigation is, of course, the only practicable way that Colorado's gay, lesbian, and bisexual citizens, and their allies, can attack such discrimination, since Amendment 2 bars them from seeking relief through the partisan political processes. As to these issues, they are every bit as "disenfranchised," at least in the short run, as Virginia's African American citizens were at the time of *NAACP v. Button*. Thus, concerted litigation activity is the only realistic avenue for their political organization and advocacy.

Nonetheless, on its face, Amendment 2 would require the Colorado courts to dismiss lawsuits brought under 42 U.S.C. § 1983, since the gravamen of each lawsuit would be a "claim of discrimination" on the "basis" of sexual orientation. Thus, Amendment 2, on its face, violates the Supremacy Clause, which provides, in pertinent part, that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. *See also Howlett v. Rose*,

4. Given the evidence of irrational animus and bigotry in the record below, this Court should conclude, despite petitioners' unconvincing platitudes about religious freedom and uniformity, that a constitutionally illegitimate desire to harm an unpopular group is *precisely* Amendment 2's objective.

496 U.S. 356, 379 (1990) (the fact that state law would offer no remedy cannot close the state courts to section 1983 lawsuits); *Testa v. Katt*, 330 U.S. 387, 389 (1947) (the Supremacy Clause requires state courts to entertain lawsuits based on federal law).

Petitioners admit the federal constitutional difficulty with according Amendment 2 its natural construction: "recognizing the constitutional supremacy problem created when a state court cannot entertain a federal cause of action, the amendment prohibits only the enforcement of *state* or *locally based* claims of discrimination." State's Trial Brief at 9-10 (citation omitted). But this attempted rescue is unavailing. First, the Colorado Supreme Court did not in fact construe Amendment 2 to avoid this constitutional infirmity. The question whether Amendment 2 is severable in this fashion is purely a question of Colorado law, and would have to be resolved in the state's courts, not by this Court's interpretive reconstruction.

Second, given Amendment 2's restriction on the use of litigation to achieve political objectives, this Court cannot save the amendment through a narrowing construction. *See O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).[5] Thus, unless this Court is prepared to hold that Colorado may bar even politically expressive lawsuits raising federal constitutional and statutory claims, it must invalidate Amendment 2 as a violation of the First and Fourteenth Amendment-based right to participate equally in the political process through litigation. To bar the state's courthouse doors to gays, lesbians, and bisexuals raising federal-law claims, while leaving those doors open to all other individuals, violates the Equal Protection Clause. *See* Laurence Tribe, American Constitutional Law § 16-11, at 1463 (2d ed. 1988) (*Button* and its progeny reflect "an ideal that binding decision mechanisms not be structured so as to exclude any

5. Moreover, under *NAACP v. Button*, this Court "will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." 371 U.S. at 432.

identifiable group, no matter what claims the group seeks to advance").

Moreover, even if the Colorado courts remain open to claims arising under federal law, that would not save Amendment 2. The state courts must equally be available for claims of discrimination that arise under state law. Suppose, for example, that a lesbian plaintiff were to bring a garden-variety personal-injury lawsuit. At a bench trial, the judge rules against her on the grounds that because she is a lesbian her testimony is inherently incredible and he believes in any event that lesbians "deserve" whatever misfortunes come their way. *Cf. Judge Is Censured for Remark Over Homosexuals*, N.Y. Times, Nov. 29, 1989, at A1 (reporting the censuring of a Texas trial judge who gave a lighter sentence to a murderer because his victims were homosexual). Such beliefs are clearly both irrational and impermissible. Courts, like all other governmental actors, are bound by the equal protection clause. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Amendment 2, however, would foreclose an appeal raising a state equal protection/due process clause claim under Colo. Const. Art. II, § 25. To the extent that a Colorado appellate court ordered lower courts or other branches or agencies of the state government to comply with principles of basic fairness, it would be requiring the adoption of nondiscrimination "policies," precisely the outcome Amendment 2 prohibits. The potential for such arbitrary and capricious discrimination in the judicial process renders Amendment 2 unconstitutional.

III. Constitutional provisions closing the ordinary political and judicial fora to a particular group of citizens seeking protection of their right to equal treatment are subject to strict scrutiny, because they have the effect of the making the affected group a "suspect class"

As we show in Part II, *supra*, Amendment 2, by its express language and as authoritatively construed below, prohibits Colorado's courts from entertaining the antidiscrimination claims of gay people arising under Federal and State law. In addition to the reasons previously advanced for holding that such a provision violates the right to political participation protected by both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, we submit that any such attempt to close both political and judicial fora to claims of unconstitutional discrimination by a particular social group *renders* that group a suspect class. Amendment 2 thus requires strict judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause. No state interest identified by petitioners in defense of Amendment 2 is sufficiently compelling to save it from constitutional invalidation.

A. The suspect classifications presently recognized reflect past pervasive denials of legal protection to particular disfavored groups

It should be clear from the outset that we are not arguing that gays and bisexuals comprise a suspect class for all equal protection purposes throughout the country. We contend rather that by adopting Amendment 2, the voters made gay and bisexual persons within the State of Colorado a suspect class.[6]

6. Petitioners assert in their opening brief that the Colorado District Court rejected respondents' argument that gays and bisexuals are for all equal protection purposes a suspect classification. Petitioners' Brief, at 17 & n.8 (citing cases in accord). Astonishingly, petitioners also maintain that all related argument on this important point is waived or "not preserved" by respondents' failure to appeal from the favorable judgment in the Colorado Supreme Court. *Id.* This is nonsense. The State District Court's ruling on the issue of suspect classification was not certified as final and could not have been appealed in the first place. More importantly, respondents and *amici* are of course entitled to defend the result below on any ground broad enough to support the judgment. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Petitioners' haste to employ an entirely specious waiver argument indicates awareness of the fundamental constitutional infirmity of Amendment 2.

This Court has been appropriately reluctant to find particular legislatively-defined categories so fundamentally at odds with our constitutional values as to require strict scrutiny of each legislative act based upon such categories. Only race (meaning the anthropologically invalid but socially significant distinction between "White," "Black," and "Asian" and other persons) and national or ethnic origin are distinctions whose legislative employment always results in strict scrutiny under the Equal Protection Clause.[7] But this Court has never held that the class of suspect classes is closed. To the contrary, this Court's cases explaining what makes a class suspect show why Colorado has here brought into existence a new class requiring the protection of strict scrutiny.

Whether Equal Protection doctrine demands employment of two tiers of "heightened review" of legislative classifications in addition to rational-basis testing, *see, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982), or embodies a single standard of rationality review under which certain classifications must be more energetically justified, *see Cleburne*, 473 U.S. at 452-54 (Stevens, J., concurring), has been long debated among the Justices of this Court. But all Justices participating in the discussion have apparently agreed that the "lengthy and tragic history" of dis-

7. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (nationality of ancestry or ethnic origin). *Cf. Graham v. Richardson*, 403 U.S. 365 (1971) (classification by condition of alienage sometimes strictly scrutinized).

crimination against various social groups, *see University of California Regents v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.), has contributed to the perceived need for closer scrutiny of legislative characterizations that harm their interests. No doubt there has been a lengthy and tragic history of oppression, discrimination and violence directed at gay people in our society, but once again *amici* do not predicate their argument on this ground. Instead, we ask rather what began that lengthy history with respect to other suspect classes. In each case, we contend, it is acts of legislative or other authoritative power that mark off a "discrete and insular minority" identified as "not as worthy or deserving as others" of protection under the law. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); *Cleburne*, 473 U.S. at 440-41.

When the Supreme Court held that the Federal Constitution was made by men who believed that African-descended slaves "had no rights which the white man was bound to respect," *see Scott v. Sandford* 60 U.S. 393, 407 (1857), it placed such people quite literally outside the protection of the federal legal system. The common law traditionally deprived aliens of most or all of its benefits; no less an authority than Littleton states that aliens could bring no actions in the King's courts as late as the opening of the sixteenth century. *See* T. Littleton, *Tenures* § 198; 9 W.S. Holdsworth, *History of English Law* 91-99 (1926). The common law as the framers of our Constitution learned and practiced it excluded married women from the separate protection of the law, as it prohibited "illegitimate" offspring from many of the civil rights enjoyed by other citizens. *See* 1 W. Blackstone, *Commentaries on the Law of England* *442-45, *459. The history of subsequent societal discrimination against such groups is horrifying indeed, but the feature distinguishing them from other groups also historically mistreated but not defined as suspect classes under the Equal Protection Clause is that of deliberate exclusion from legal protection. Gender, illegitimacy, and alienage are all "quasi-suspect" in equal protection doctrine, we submit, as a consequence of the history of partial exclusion from legal protection. Race occupies its unique position in American constitutional law because of the unique condition of legal exclusion to which African-descended persons were subjected for generations.

B. Depriving a group of the benefit of equal protection by prohibiting courts and legislatures from rectifying discrimination makes the group a suspect class

Thus, we maintain, the suspect classes recognized under this Court's Equal Protection doctrine are groups to whom the full formal protection of the law has been denied. This formal denial of legal protection then generates or coexists with other forms of societal discrimination and mistreatment. One page of this history, Justice Marshall said, was "worth a volume of logic" in defining suspect classes under the Equal Protection Clause. *Cleburne*, 473 U.S. at 472-73 n.24, (Marshall, J., concurring in part and dissenting in part) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

In one of the infrequent attempts to give a functional definition of the indicia of a suspect class, the Court has said that groups comprising a suspect class are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). No more relevant disability can be imagined than a State constitutional provision prohibiting any court or legislature within the State from remedying discrimination, no matter how arbitrary or irrational, aimed at a particular group of citizens. *Amici* submit that such a State constitutional provision makes the group against which it is aimed a suspect class, precisely as past formal exclusions from legal protection have made the groups at which they were directed suspect or quasi-suspect classes. The

provision itself must be justified by a compelling state interest, and all subsequent legislation differentially affecting that group within the State should receive the same treatment.

C. Amendment 2 creates a discrete and insular minority in Colorado whose members are uniquely prohibited from seeking enforcement of the Fourteenth Amendment in their own State

This is precisely the situation created in Colorado by the adoption of Amendment 2. Gay people alone are prohibited from using the legislatures and courts of the State to counteract discrimination forbidden by the Federal Constitution. They may not seek legislation designed to overcome any statutes, regulations, judicial decisions or administrative actions reflecting "prejudice," "antipathy," or "a bare desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 440, 446-47. The courts of the State are closed to them for the vindication of federal rights which under Article VI of the Federal Constitution the State's judges are sworn to protect. Amendment 2 "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," for which reason the Court should accord "a correspondingly more searching judicial inquiry," under which Amendment 2 must be justified by compelling state interests. *See Carolene Products*, 304 U.S. at 153 n.4.

Amendment 2 does, as respondents maintained below and as the Colorado Supreme Court found, deprive gay people of effective political participation. But this Court should find Amendment 2 repugnant to the spirit of the Equal Protection Clause for broader and more urgent reasons. As the Justice who did more than any other lawyer of the century to define the effective meaning of equal protection wrote, "[t]he discreteness and insularity warranting a 'more searching judicial inquiry' must ... be viewed from a social and cultural perspective as well

as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community." *Cleburne*, 473 U.S. 473 n.24 (Marshall, J., concurring in part and dissenting in part) (citation omitted). The Justices of this Court are the final defenders of the rights of all stigmatized individuals. At the end of the day, this Court's willingness to engage in "searching judicial inquiry" is the only protection against acts of reckless discriminatory populism like Amendment 2.

None of the interests identified by petitioners in support of Amendment 2 even begins to justify the abhorrent creation of a discrete and insular minority forbidden to apply to the courts or to state or local legislatures and administrative agencies for remedies against acts of private or public hate. Petitioners claim that the amendment is justified by the limited resources available for antidiscrimination enforcement; "anti-discrimination protections," they assert, "should be reserved for those who are particularly deserving of special protection." Petitioners' Brief, at 13. This is unparalleled constitutional effrontery, attempting to justify uniquely disadvantaging legislation on the ground that the group against which it is aimed is undeserving of basic legal equality. Petitioners also claim that Amendment 2 is justified because "a single uniform rule has inherent advantages for efficient law enforcement." *Id.* Would the allegedly compelling interest in statewide uniformity have justified officials of the State of Arkansas in prohibiting integration of the Little Rock public schools, despite local officials' willingness to meet their constitutional responsibilities, because school boards elsewhere in Arkansas continued to resist the judgment of this Court? *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

Most astonishingly of all, petitioners claim that Amendment 2 is supported by the State's interest in the principle "which has variously [*sic*] been described as 'that

government is best which governs least.'" Petitioners' Brief, at 13, 46. Perhaps, as petitioners claim, this was the theory of Thomas Paine, or Henry David Thoreau, or even Thomas Jefferson. *See id.* at 46 n.33. But it is not the theory of our Constitution. So long as the Fourteenth Amendment remains part of the supreme law of our land, that government is best which does not deny to any person within its jurisdiction the equal protection of the laws.

Conclusion

Amici urge this Court to affirm the judgment of the Colorado Supreme Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
v.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF AMICI CURIAE OF AFFIRMATION: UNITED METHODISTS FOR GAY, LESBIAN AND BISEXUAL CONCERNS; AXIOS USA, INC.; THE BRETHREN/MENNONITE COUNCIL FOR LESBIAN AND GAY CONCERNS; DIGNITY/USA; EVANGELICALS CONCERNED, INC.; INTEGRITY, INC.; LUTHERANS CONCERNED/NORTH AMERICA; PRESBYTERIANS FOR LESBIAN/GAY CONCERNS; UNITED CHURCH COALITION FOR LESBIAN/GAY CONCERNS; and THE WORLD CONGRESS OF GAY AND LESBIAN JEWISH ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

	Page
IDENTITY AND INTEREST OF THE AMICI CURIAE	2
A. Our Identity	2
B. Our Interest As Amici	7
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE WELL-WORN TECHNIQUES FOR EXCLUDING A MINORITY: IF TYRANNY IS YOUR AIM, "IF YOU HAVE NO DOUBT OF YOUR PREMISES OR YOUR POWER," THEN FIRST, YOU PUT YOUR EXCLUSION "IN LAW" NOW AND, SECOND, YOU "SWEEP AWAY ALL OPPOSITION" NOW AND INTO THE FUTURE SO AS TO PRESERVE THAT EXCLUSION FOR ALL TIME	13
II. AMENDMENT 2 FOLLOWS THE HISTORIC PATTERN OF EXCLUSION: IT EXCLUDES GAY PEOPLE IN THE PRESENT AND GUARANTEES THAT RESULT INTO THE FUTURE BY SUPPRESSING FIRST AMENDMENT RIGHTS	19
III. AMENDMENT 2 TRANSGRESSES THE FIRST AMENDMENT IN FOUR WAYS	23
Content Restriction	23
Speaker Restriction	24
Public Forum	25
Petition Clause	26
CONCLUSION	29

TABLE OF AUTHORITIES

DECISIONS OF THE UNITED STATES SUPREME COURT

	Page
Abrams v. United States, 250 U.S. 616 (1919)	13, 21
Adarand Constructors v. Peña, No. 93-1841, —— U.S. —— (June 12, 1995)	15, 17
Bowers v. Hardwick, 478 U.S. 186 (1986)	*passim*
California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972)	27
City of Madison v. Wisconsin Employment Rels. Comm'n, 429 U.S. 167 (1976)	25
Cohen v. California, 403 U.S. 15 (1971)	21
Crist v. Murray, 1995 U.S. LEXIS 3622 (May 30, 1995)	22
Dred Scott v. Sandford, 60 U.S. 393 (1856)	*passim*
Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976)	24
Eisenstadt v. Baird, 405 U.S. 438 (1972)	11, 18
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)	24
Garrison v. Louisiana, 379 U.S. 64 (1964)	21
Griswold v. Connecticut, 381 U.S. 479 (1965)	8
Groppi v. Wisconsin, 400 U.S. 505 (1971)	24
Hague v. Committee for Indus. Org., 307 U.S. 496 (1939)	22
Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976)	24
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)	17
Landmark Communs., Inc. v. Virginia, 435 U.S. 829 (1978)	24
Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977)	22
Loving v. Virginia, 388 U.S. 1 (1967)	18
McDonald v. Smith, 472 U.S. 479 (1985)	22, 26
Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974)	24
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984)	10, 27, 28
Mullaney v. Wilbur, 421 U.S. 684 (1975)	24

TABLE OF AUTHORITIES—Continued

	Page
NAACP v. Button, 371 U.S. 415 (1963)	22
North Carolina v. Butler, 441 U.S. 369 (1979)	24
O'Brien v. Skinner, 414 U.S. 524 (1974)	24
Planned Parenthood v. Casey, —— U.S. ——, 112 S. Ct. 2791 (1992)	17
Police Dep't v. Mosley, 408 U.S. 92 (1972)	23
Shelley v. Kraemer, 334 U.S. 1 (1948)	17
Slaughter-House Cases, 83 U.S. 36 (1873)	12, 22
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	25
Ward v. Illinois, 431 U.S. 767 (1977)	24
Wardius v. Oregon, 412 U.S. 470 (1973)	24
Whitney v. California, 274 U.S. 357 (1927)	21, 22

OTHER DECISIONS

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989)	18
Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 1995 U.S. App. LEXIS 10462 (6th Cir. May 12 & 17, 1995)	18
Evans v. Romer, 854 P.2d 1270 (1993)	24
Evans v. Romer, 882 P.2d 1335 (1994)	12, 28
High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563 (9th Cir. 1990)	18
Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)	18
Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994)	18
Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989)	18

UNITED STATES CONSTITUTION

U.S. Const. amend. I	*passim*
U.S. Const. amend. XIV	12

OTHER AUTHORITIES

Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985)	21
H.M. HART, JR. & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958)	10

TABLE OF AUTHORITIES—Continued

	Page
Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986)	26-28
Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980)	18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-1039

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
v.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF AMICI CURIAE OF AFFIRMATION: UNITED METHODISTS FOR GAY, LESBIAN AND BISEXUAL CONCERNS; AXIOS USA, INC.; THE BRETHREN/ MENNONITE COUNCIL FOR LESBIAN AND GAY CONCERNS; DIGNITY/USA; EVANGELICALS CONCERNED, INC.; INTEGRITY, INC.; LUTHERANS CONCERNED/NORTH AMERICA; PRESBYTERIANS FOR LESBIAN/GAY CONCERNS; UNITED CHURCH COALITION FOR LESBIAN/GAY CONCERNS; and THE WORLD CONGRESS OF GAY AND LESBIAN JEWISH ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF THE AMICI CURIAE

We address the Court as Jews and Christians who depend in our society upon all of the full panoply of civil liberties guaranteed us by the First Amendment to the Constitution of the United States. As groups consisting largely of Christian and Jewish gay males, lesbians, and bisexuals, our organizations have unanimously adopted as our unified purpose to speak, to advocate, to publish, and to petition for recognition of our inalienable rights.

Our religious commitment and tradition propel us to claim the rights of citizenship of our constituents and to call upon this Court to honor its mandate and tradition of safeguarding the fundamental rights of all citizens of this Nation, no matter how despised or unpopular. While we fully support the equal protection rights, as briefed by the Respondents, and the rights secured by the religion clauses, as briefed by other amici supporting the Respondents, we submit this Brief to demonstrate the massive infringement by Amendment 2 of the First Amendment rights of speech and petition.

A. Our Identity

Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns consists of lesbians, bisexuals, gay men, and their friends, families and supporters who affirm full participation of all persons in the United Methodist Church. We celebrate God's gifts of sexuality and sensuality, with all their blessings for intimacy, relationship and personal growth. We have organized to care for one another, to represent our concerns to and with the United Methodist Church, and to speak boldly for the inclusion of all people. We seek to respond positively to God's love to all persons and, in doing so, speak in a prophetic voice to church and society.

Axios USA, Inc. is an organization of gay and lesbian lay Christians. We work for the knowledge and understanding of men and women of homosexual orientation among the public and within the institutions of the

various Eastern Orthodox, Oriental Orthodox (Non-Chalcedonian), and Eastern-Rite Catholic Churches by means of educational and charitable activities. Our members engage in research and dialogue with church authorities and members of the gay and lesbian community. We honor, among others, the lives and martyrdom of Saints Sergius and Bacchus (recognized by both Catholics and Orthodox), whose accepted *martyrium* has one calling the other "sweet campanion and [erotic/romantic] lover." They were martyred at the turn of the third century A.D. for refusing to worship Jupiter. Their love for each other inspired those around them and us today.

The *Brethren/Mennonite Council for Lesbian and Gay Concerns* is organized for purposes of the advancement of education regarding lesbian, bisexual and gay male concerns in the church and in general society—especially the elimination of prejudice and discrimination, the defense of civil rights secured by law, and the development of social activities and public or professional services for the betterment of lesbians, bisexuals and gay men and of the Brethren and Mennonite churches.

Dignity/USA is a national organization of gay, lesbian, and bisexual Catholics; their families; and friends. This year, we celebrate twenty-five years of ministering to the spiritual needs of the gay, lesbian, and bisexual community. We have eighty-five affiliated chapters throughout the country, and each week we provide spiritual nurturing to the thousands of our members of the gay community who seek guidance and renewal. We live our beliefs by joining with other lay organizations of the Roman Catholic Church in proclaiming our Catholicism and our beliefs in living the Gospel message. Dignity/USA seeks to be an instrument through which its members may be heard by the institutional church and society. We seek to speak our conviction that we, as gay people, can express our sexuality in a maner consonant with Christ's teaching and that we can express our sexuality physically in a unitive manner that is loving, life-giving, and life-affirming.

We encourage our members to work for justice and social acceptance through education and legal reform.

Evangelicals Concerned, Inc. is a national organization dedicated to assisting lesbians and gay men and churches better to understand homosexuality and the good news of God's grace and peace. We fulfill our purpose of providing a fellowship of Christians concerned about the interface between Christian life and homosexuality by, among other things, publishing literature and conducting professional fora and educational colloquia on homosexuality and Christian life.

In *Integrity, Inc.*, we hold our mission to be the witness of the lesbian and gay community in the Episcopal Church and of the Episcopal Church in the lesbian and gay community. We engage in a ministry of worship, education, advocacy, fellowship, and service. We started out as a newsletter in rural Georgia and have grown to more than seventy chapters in the United States, Canada, and Australia. Our membership is open to all who support gay and lesbian rights in the Episcopal church, and we are proud to count several of our bishops among our membership. In 1993, we adopted a resolution calling upon "our national church and the agencies and institutions which report to it to refrain from scheduling General Convention, other meetings or official activities in the State of Colorado until such time as Amendment 2 is repealed or overturned." At last year's General Convention of the Episcopal Church, some 27 openly lesbian and gay deputies, elected by dioceses, played a role in the Convention's passage of several pro-gay resolutions, including the call for the inclusion of sexual orientation in state and federal civil rights laws.

Lutherans Concerned/North America, Inc. stands as a community of faith, modeling the gospel within the church and within the lesbian and gay community. We seek to embody the Gospel's principles of inclusiveness and justice, celebrating God's gifts of sexuality and diversity. Our members serve as pastors, officials, and lay leaders with-

in the Lutheran Church. Our goals are to affirm the God-given nature of sexual orientation, to proclaim the good news of Jesus Christ through inclusive worship and to promote positive changes in all expressions of the Lutheran Church, including the Evangelical Lutheran Church in America; the Lutheran Church—Missouri Synod; and the Wisconsin Evangelical Lutheran Synod. In furtherance of these goals, we have adopted as our logo a combination of the fish and pink triangle, a symbol that visually unites symbols of our Christian faith and courage against sexual discrimination. The *ichthus,* or fish symbol, originated as a secret recognition sign when Christians in the Roman Empire were persecuted for their faith. The pink triangle was used by the Nazis to identify tens of thousands (no one knows exactly how many) of European homosexuals who were persecuted by, and murdered in the death camps of, the Third Reich. The triangle shape also symbolizes the Holy Trinity. Both symbols are now used by our respective communities today as signs of honor and support. We unite them to show that Christian life and human sexuality can be reconciled into one. Through our ministry, we seek to help the hurting and to speak up for those who cannot risk openness.

Presbyterians for Lesbian/Gay Concerns is a "special organization" within the Presbyterian Church (U.S.A.). We report annually to the Theology and Worship unit within the national headquarters of the Presbyterian Church (U.S.A.). Through proclamation of the liberating and inclusive Gospel of Jesus Christ to all people, we seek to facilitate, by the distribution of educational materials and otherwise, the intelligent consideration by Presbyterian governing bodies of support for legislation prohibiting discrimination on the basis of affectional and sexual preference or orientation and for legislation deleting restrictions on the private sexual behavior of consenting adults.

United Church Coalition for Lesbian/Gay Concerns affirms, empowers, educates, and advocates, providing support and sanctuary to all our lesbian, gay, and bisexual sisters and brothers, their families and friends. We advocate for full civil rights and bring Christ's affirming message of love and justice for all to the Church and society. We affirm the good news that all persons without regard to sexual orientation are loved and empowered by God, and we promote ministries of pastoral care, education, and advocacy within the United Church of Christ and society as a whole. We enjoy a good working relationship with the various instrumentalities and administrative officers of the United Church of Christ.

The *World Congress of Gay and Lesbian Jewish Organizations* has over fifty member organizations throughout the world. To have voting or associate member status in the World Congress, an organization must be a primarily Gay and/or Lesbian and a primarily Jewish organization. Many of our member organizations are religious communities and congregations, most of which are affiliated with the United Hebrew Synagogues of America. We are established in order to coordinate and promote educational and development programs for gay and lesbian Jewish groups throughout the world and to further the concerns of the World Congress in the wider Jewish and gay/lesbian communities. We pursue the eradication of sexism, homophobia, and anti-semitism through educational programs. Thus, for instance, one of our member organizations, the Society for the Protection of Personal Rights, planned and scheduled a ceremony last year at Yad Vashem to commemorate the six million Jews slaughtered by the Nazis in World War II, including the five to ten percent among them who were homosexual men and women. The World Congress participated in this ceremony, which was disrupted by dissenters. We stood together as proud gays and lesbians, facing down the disrupters with our singing and our faith.

B. Our Interest As Amici

As Jewish and Christian gay people dedicated to the mandates and promises of our faiths, we claim our right to this Court's vigilant guardianship over our fundamental rights as citizens of this Nation, including our First Amendment rights of speech and petition. Speaking on January 29, 1995, to the Church of the Covenant, a federated church of the United Church of Christ and the Presbyterian Church (U.S.A.) in Boston, Massachusetts, Roger S. Powers commended:

> Like the abolitionists of the nineteenth century who fought against slavery, like the suffragists who fought for the rights of women, and like the African-American churches that fought for civil rights, we are fighting today for gay rights, and with God's help, we, too, shall overcome . . . *We have a responsibility to speak the truth* to them, but to do so with love and compassion in ways that they can hear us and not simply reject us out of hand . . . .

The responsibility to speak of which Mr. Powers admonished is borne of our faith and our commitment to a God of equality and justice. As Americans, our innate right to proclaim this message and to claim its implications is guaranteed through our Constitution.

A prominent purpose of our organizations, in exercise of our First Amendment freedoms of speech and petition, is to claim our rights as equal citizens in this country and in God's world order. By forbidding the promulgation or enforcement of any law or regulation that would entitle our members "to claim" protection, Colorado's Amendment 2 forbids that which our religious faith and civic conviction require us to do.

To remove any doubt, we stand before this Court to give witness to the fact that gay people in the United States encounter discrimination in a multitude of invidious ways. One need only look to the law of this Court to discover how pervasively society demeans us. We hold

our loving relationships of companionship to be "a coming together for better or for worse, hopefully enduring, and *intimate to the degree of being sacred.*" *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (all emphasis herein supplied unless otherwise indicated). Yet, even certain expressions of our love—which we believe to be blessed by God—have been deemed by this Court to justify criminalization and imprisonment. In a similar vein, it is often the very identification of ourselves as gay people that provokes the discrimination we suffer. A lesbian couple who fly the rainbow flag (often a symbol of pride in our sexual orientation) in front of their home awaken to a violent attack upon their property. A gay man who, out of dignity and honesty, reveals his sexuality at work loses his job. A gay or lesbian couple cannot find housing because they introduce themselves as life partners. Gay or lesbian parents are declared unfit, and their children are taken away. In Colorado, we achieve a modicum of equality in isolated measures taken to afford to us the basic freedoms enjoyed by other people, and a State constitutional amendment is adopted that prohibits us even from claiming equal protection. If we articulate our sexual orientation, we must constantly confront a world of antagonism and suspicion.

This Court has a clear and unquestionable duty to guard our right to speak and to petition our school districts, our city and county governments, all levels of government, our Nation and its constituent States, and our fellow citizens. Through this Brief, we bring this interest before the Court.

SUMMARY OF ARGUMENT

In their defense of Amendment 2, Petitioners focus narrowly on the repeal of existing protection for gay people effectuated by Amendment 2. *E.g.*, Brief for Petitioners at 6. If Amendment 2 presented nothing more than a repeal, this Court could perhaps rely more comfortably upon the background assumption that the political branches and democratic processes generally would remain available to rectify any improvident decision. *See* Brief for Respondents at Arg. Sec. I.A.1. But Amendment 2 is far more than an instance of repealing legislation, and for this reason, the judicial assumption of available political processes must not become operative. Indeed, Amendment 2, in addition to excluding gay people in the present time by repealing all existing protection, operates prospectively to preserve that exclusion for all time. Respondents demonstrate that this second feature of Amendment 2, the prospective exclusion, unconstitutionally burdens the right to participate *equally* in the political process. The present Brief demonstrates that, wholly apart from an equal protection analysis, the means chosen to accomplish this second goal are also in direct violation of the right to participate (to speak and to petition) in the political process as guaranteed by the First Amendment.

Amendment 2 accomplishes its second goal, perpetuating the exclusion of gay people into the future and preventing any future adoption of protection, by suppressing the political speech that precedes the adoption of legislation. Specifically, Amendment 2 accomplishes this second goal 1) by establishing an absolute prohibition on even the making of a claim for protection and 2) by eliminating the capacity of government even to hear such a claim. The record in this case provides concrete examples of how this will work. Plaintiff Romero brought about protection from discrimination in the Denver Police Department by petitioning the Department, using a departmental grievance procedure, whether formal or informal, to consider adopting such protection. Likewise, Plaintiff Evans brought about protection in state government by petitioning the Governor, using a state rulemaking procedure, to consider adopting such protection. *See* Brief for Respondents at Statement of Case Sec. II.A. Among the many other things it will do, Amendment 2 will prohibit Romero, Evans, and others from using such state and local procedures in the future to make a claim

for—to speak out for, to advocate for, to petition for—the adoption of such protection. And the Amendment will also eliminate the capacity of the Denver Police Department, the Governor, and all other state and local branches and levels of government to hear, or even to receive, such a petition.

This Brief demonstrates that, in these aspects at the very least, Amendment 2 transgresses the First Amendment in four ways. The prohibition on the making of a claim for protection violates well-settled First Amendment doctrines condemning 1) content restrictions, 2) speaker restrictions, and 3) discriminatory access to public fora. These doctrines and the protections they afford are supported by both the Speech Clause and the Petition Clause.

This Brief submits that Amendment 2's elimination of the capacity of government to hear such a claim violates an additional fourth protection supported by the Petition Clause. Mindful of this Court's decision in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Brief does not posit a (judicially enforceable) duty on the part of government to hear a petition. The Brief does not, and need not, posit a governmental duty corresponding to the citizen's right to petition. Instead, the Brief posits that, in light of its language, its history, and its place in our constitutional structure, the Petition Clause protects the capacity of representative government—in Hohfeldian terms, the *power* [1]—to receive; to listen to; to be informed by; to entertain; and when appropriate, to respond meaningfully to a petition.

It is precisely because Amendment 2 so alters the inherited structure of democratic self-government that the judicial assumption of rectification through the political process must not be allowed to become operative in this

[1] *See* H.M. HART, JR. & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141-79 (tent. ed. 1958).

case. Amendment 2 not only undermines impartial democratic process, *see* Brief for Respondents at Arg. Sec. I.A.1, it also dismantles the process itself.

ARGUMENT

It has been said that the civic religion of the United States is human rights. This civic religion first found expression in the concept of universal citizenship. The Declaration of Independence proclaimed a precivic, natural, and God-given citizenship for all human beings: "all men are created equal," and "they are endowed by their Creator with certain unalienable rights." When the United States Constitution followed, it used the word *citizen* to give civic expression to this belief in the full and equal dignity of every person. Despite the reference to men, these formulations have always been rightly understood to mean women and minors as well. *See Dred Scott v. Sandford*, 60 U.S. 393, 422 (1856) (opinion of the Court per Taney, C.J.)

Perhaps more important than the actual rights, privileges, and immunities bound up in citizenship is the principle that each and every person is entitled to full and equal participation in those rights whatever they may be. The content of these privileges and immunities has been found, at least in part, in the concept of ordered liberty. *See Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). But the ultimate guarantee of liberty resides much more in the promise of full and equal participation by everyone. A right granted to one must be afforded to all others. And if a right is to be denied to one, all others must suffer a like deprivation. *See Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972). It is in the rigorous and vigilant application of the principle of equality, inherent from the beginning in the promise of full and *equal* citizenship *for all*, that we can best preserve against the fencing-out of any one of us.

It may be that this Court has begun to doubt the legitimacy of its fundamental rights jurisprudence, at least

when called upon to acknowledge these rights in certain despised classes of citizens, on the ground that these rights are not "textual." *See Bowers,* 478 U.S. at 191, 194-95. On the textualist's objection, it is instructive to consider the views advanced in the concurring opinion filed by Justice Scott in the Colorado Supreme Court. Justice Scott maintains that, but for the mistake of the *Slaughter-House Cases,* 83 U.S. 36 (1873), the present case and many others would be governed by the substantive entitlements afforded by the Privileges or Immunities Clause of the Fourteenth Amendment. *See Evans v. Romer,* 882 P.2d 1335, 1356 (1994) (Scott, J., concurring). Indeed, viewed from this perspective, much of this Court's substantive due process and fundamental rights jurisprudence, and even the incorporation doctrine, are not so much nontextual exercises in judicial illegitimacy as they are compensating mechanisms: that is, doctrines developed to compensate for the mistake of the *Slaughter-House Cases* and to realize the express and *textual* promise of the Privileges or Immunities Clause. *Cf. id* at 1353-54. In light of Justice Scott's assessment of the controlling significance (but for the *Slaughter-House* rule of decision) of the Privileges or Immunities Clause, it would be wise to recall what necessitated the Clause. This Clause was given top billing in the Fourteenth Amendment because the Clause, together with the opening sentence of the Amendment, was designed to overrule the *Dred Scott* decision, the classic fencing-out decision of American judicial history.

I. THE WELL-WORN TECHNIQUES FOR EXCLUDING A MINORITY: IF TYRANNY IS YOUR AIM, "IF YOU HAVE NO DOUBT OF YOUR PREMISES OR YOUR POWER," THEN *FIRST,* YOU PUT YOUR EXCLUSION "IN LAW" NOW AND, *SECOND,* YOU "SWEEP AWAY ALL OPPOSITION" NOW AND INTO THE FUTURE SO AS TO PRESERVE THAT EXCLUSION FOR ALL TIME [2]

Mr. Scott brought a claim to be free of Mr. Sanford's assaults. Sanford defended by claiming a slaveholder's privilege to lay his hands upon and imprison Scott and family. Further, Sanford challenged even Scott's right to make a claim, on the ground that Scott was assertedly not a citizen. If Scott had no citizenship, then he had no right to make a claim, one of the privileges of citizenship. *See* 60 U.S. at 396-99. The *Dred Scott* Court's fateful decision of this question of citizenship came in some two parts.

First, the Court acknowledged the universality of the language employed in the founding documents, the Declaration and the Constitution, and that this language and "the principles" thereby expressed would seem to "embrace the whole human family." *Id.* at 410. Nevertheless, the Court embarked upon an inquiry into who was "intended to be included" and who was "intended to be excluded" "at that time." *Id.* at 406-07. The "proof" of this original intent was to be divined through a survey of legislative acts, court decisions, and everyday practices throughout "the public history of every European nation" of "the English Government and English people," and of "the British colonies" up until the time that the Declaration and Constitution were framed (and possibly even thereafter into the early decades of the nineteenth century). *Id.* at 407-17. The Court found in this history not merely an original intent to exclude those who were enslaved. The Court found much more

[2] *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

an original intent to exclude all persons of African descent regardless of whether enslaved, once enslaved and later emancipated, or even never enslaved, say, because of recent immigration and (attempted) naturalization. *Id.* at 416-23. For every example where someone in this public history had broken free of the abysmal record of racism and had inched forward in realizing the promise of full and equal citizenship for all (in the abolition of slavery in some colonies and states for instance), the Court found a counterexample. Thus, even in these free states, the Court noted, some had remained "actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale" in this country. *Id.* at 412. As between two such conflicting examples, the Court felt constrained to heed the latter example in its search for original intent. By these means, the *Dred Scott* Court drained the founding documents of principled content.

It was as if at the moment that Mr. Jefferson glimpsed new principles by which to organize a more nearly just polity and put them to paper, if at that moment it was beyond Jefferson's power to realize these principles instantaneously in the world about him, then his "intent" would rather be found in the examples set by the very old order he had vainly sought to revolutionize. Tragically, this completely neglected Jefferson's capacity to imagine a better way and his indisputable intention to bequeath that vision to posterity. Indeed, the entire polity would be held in check until the last blackheart slavetrader on the coast of New England had been persuaded to desist.

Put another way, this technique of constitutional interpretation may well be useful under certain carefully delimited circumstances. If, in a given instance, the Framers were merely constitutionalizing a preexisting rule of law, then it may be legitimate to survey public history to ascertain the content of that rule. When, however, the Framers were establishing new principles, when they were

writing a new page in world history, then it is nothing short of a travesty to purport to find the "intent" animating these new principles in the example of the old order they were squarely rejecting.

In 1856, the Constitution held no express guarantee of equal protection, but the equality principle has always been understood as the central meaning of justice. How did the *Dred Scott* Court formally introduce apartheid into America in the very teeth of this bedrock principle of justice? It was done by finding that African-Americans constitute "an inferior and subordinate class." *Id.* at 417; *see also id.* at 404-05, 416. If people of African descent were found to be inferior, why they would not be entitled to equal treatment. There seems to have been no consciousness that, in matters of this nature, even this Court's finding of inferiority in the person of the petitioner is utterly irrelevant. The entitlement to participate fully and equally in citizenship is a political and civic claim and not in any way contingent upon a factual showing of superior worth or even of equal worth.[3] The privileges and immunities attaching to citizenship are not contingent or conditional, but rather "unalienable."

Second, having embarked on the course of exclusion, the *Dred Scott* Court took the further step of disabling other political actors so that the scheme of apartheid would remain virtually unalterable. On why the exclusion had to cover, not only slaves, but all "persons of the negro race" including free persons, the Court candidly admitted that it was necessary in order to eliminate any entitlement to First Amendment rights: If free Blacks qualified as citizens, then

> It would give to persons of the negro race, who were recognised as citizens in any one State of the Union,

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[3] *See Adarand Constructors v. Peña*, No. 93-1841, —— U.S. —— (June 12, 1995) (Thomas, J., concurring) ("Government cannot make us equal; it can only recognize, respect and protect us as equal before the law").

> the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; *and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs* . . . .

Id. at 417; *see also id.* at 425. Having thereby suppressed the political voice of the people whose every last hope of liberty was being snatched away, the Court then also disabled the political branches from hearing that voice, specifically declaring Congress and the Executive to be without power to interfere with slavery in any way or even to pass laws protecting emancipated Black persons. *Id.* at 425-26; *see also id.* at 452.

By these means, Mr. Scott was rendered stateless. As a stateless person, Scott had none of the privileges and immunities of citizenship and therefore did not have the right even to assert a claim. Accordingly, his case was dismissed without the Court's ever having addressed the merits of his claim. *See id.* at 454.

For African-Americans, the *Dred Scott* decision was a one-act play with two devastating scenes. For gay Americans, the play is being rewritten as a two-act play. Retracing the first scene of the *Dred Scott* decision with remarkable fidelity, the *Bowers* decision was the first act. This Court's resolution of the present case could well be the second act.

The *Bowers* decision excluded gay Americans from participation in the fundamental rights of privacy and of intimate association. Of course, by insisting upon an "as applied" analysis; by disregarding the actual text of the Georgia statute (which made no reference to the gender mix of those committing "sodomy"); by ignoring the possibility of heterosexual plaintiffs regardless of whether "John and Mary Doe" had standing; and perhaps most important, by arbitrarily redefining the fundamental right to be "a fundamental right to homosexuals" only to engage in "consensual homosexual sodomy," *see* 478 U.S. at 188 n.2, 192, the *Bowers* Court stacked the deck. But one might ask why Mr. Scott was, in similar fashion, perceived by this Court exclusively in terms of being Black, Negro, and African, but never as a human being pure and simple. In both cases, the Court gave the appearance of devaluing the right at issue, at least in the hands of certain rightholders, because of a low appraisal of the worth of the rightholder. There was, moreover, in *Bowers* the same evasion of principle and the same recourse instead to a purportedly original intent to be proven by historical examples of blackhearted oppression dating back to the ancient Romans and beyond. *See id.* at 192-94; *see also id.* at 196-97 (Burger, C.J., concurring).

The Court said that it would come "nearest to illegitimacy" to acknowledge these fundamental rights in gay Americans. *Id.* at 194. If the Court was truly seized with doubt in 1986 about its fundamental rights jurisprudence, there was at least one remaining overriding principle with which to contend. The Court said that there was no equal protection claim before it. *Id.* at 196 n.8. But it seems to have been totally unconscious of the duty of judges, too, *see Shelley v. Kramer*, 334 U.S. 1 (1948), to observe the principle, the supreme principle, of equality. *See Planned Parenthood v. Casey*, —— U.S. ——, 112 S. Ct. 2791 (1992) (opinion of the Court per O'Connor, J.; Kennedy, J.; and Souter, J.); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (opinion of the Court per Souter, J.); *see also Adarand Constructors*, —— U.S. at —— (Thomas, J., concurring) ("the principle of inherent equality that underlies and infuses our Constitution"). Even if some constitutional value was deemed to be offended by fundamental rights, that value was nonetheless subordinate to the

supreme constitutional principle of equality. Because the rights had been recognized in others, rigorous application of the equality principle demanded that the rights be recognized in all. As in *Dred Scott*, the only purported escape from the equality principle would have been a finding of the inferiority of gay people, of their capacity to be loving human beings, and of their intimate relationships of companionship and family. Indeed, later courts have found evidence in the *Bowers* opinion that the Court endorsed this assertion of inferiority.[4]

Branded with this Court's imprimatur of criminality; immorality; and in a word, inferiority, gay people were robbed of an essential part of what it means to be a human being of full and equal dignity.[5] As citizens, they were reduced to the barebone rights of self-defense embodied in the First Amendment. Even while bearing the brand of inferiority and all the injurious consequences (the relentless discrimination in the workplace, in housing, in family relations) flowing therefrom, at least they had the bare minimum of First Amendment rights to

[4] *E.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 1995 U.S. App. LEXIS 10462, at *9-*16 (6th Cir. May 12 & 17, 1995); *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987); *see also Bowers*, 478 U.S. at 196.

[5] The right of intimate association has been said to encompass values as essential to human dignity and happiness as opportunities for caring, commitment, and love. *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630-36 (1980). Short of changing their gender through surgery, gay people are now denied the liberty to pursue these opportunities. *Cf. id.* at 658; *Loving v. Virginia*, 388 U.S. 1 (1967). Nor will it do to say that only the most casual of relationships have been forbidden for it is by casual beginnings that human beings develop their most durable intimate associations. *See* Karst, *supra*, at 633; *cf. Eisenstadt*, 405 U.S. at 453.

attempt to persuade a hostile majority to acknowledge their humanity. And in this one particular, the *Bowers* decision did differ from the *Dred Scott* decision; because the *Bowers* Court expressly acknowledged that there was "no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy." *Bowers*, 478 U.S. at 190. The instant case presents the question whether gay people will retain even this right to speak out, to advocate, to petition, and to claim recognition of their full and equal dignity—the right to participate in the political processes of this Nation.

II. AMENDMENT 2 FOLLOWS THE HISTORIC PATTERN OF EXCLUSION: IT EXCLUDES GAY PEOPLE IN THE PRESENT AND GUARANTEES THAT RESULT INTO THE FUTURE BY SUPPRESSING FIRST AMENDMENT RIGHTS

Again following the historic pattern of exclusion, Amendment 2 is designed to accomplish two goals. First, to the fullest extent of Colorado's power, the Amendment repeals all existing legal protection for gay people. Second, having fenced out gay people in the present time, the Amendment would seek to freeze that result and make it unalterable for all time. The means chosen to accomplish this second goal—1) an absolute prohibition on even the making of a claim for protection and 2) an incapacitation of government even to hear such a claim—are in direct violation of the rights guaranteed by the First Amendment.

Amendment 2 prohibits the use of any state or local procedural vehicle or setting [6]—and, further, prohibits any state or local government actor [7] from permitting the

[6] Under "any statute, regulation, ordinance or policy." Amendment 2.

[7] The "State of Colorado, through any of its branches or departments, . . . any of its agencies, political subdivisions, municipalities or school districts." Amendment 2.

use of any state or local vehicle[8]—"*to* have or *claim* any minority status, . . . *protected status* or claim of discrimination."[9] The Amendment uses the phrase *to claim*, a verb or action word. It prohibits even the making, or speaking, of a claim. The Amendment prohibits even the making of a claim seeking protection from discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Accord* Brief for Respondents at Arg. Sec. I.B.1 (citing State's expert witness Finnis); Brief *Amici Curiae* of Christian Legal Society, et al. at 21. And all state and local officials are likewise instructed to deny all their procedures, to turn a deaf ear, even to the making of a claim for the protection of gay people.

This second goal (freezing a result for all time) apparently presented the drafters of Amendment 2 with an age-old dilemma. One of the virtues of the republican form of government, resting upon principles of democracy and self-governance, is that it will be capable of adapting and thus ever-changing. Working hand in glove with principles of our collective democracy are the First Amendment rights of each individual citizen. In good

[8] No state or local governmental actor "shall enact, adopt or *enforce*." Amendment 2.

[9] Petitioners have misquoted Amendment 2 in their briefing before this Court, performing a certain elision at critical passages in the text of the Amendment. *See* Petition for Writ of Certiorari at 2; (Uncorrected) Brief for Petitioners at 2. The full and correct text of Amendment 2, as now codified, is as follows:

> Section 30b. No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons *to* have or *claim* any minority status, quota preferences, *protected status* or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

times and bad times alike, First Amendment rights are rights of self-determination that may be exercised for political purposes or for wholly nonpolitical purposes. *See Cohen v. California,* 403 U.S. 15, 24 (1971). But especially in bad times, when faced with a hostile majority, the individual's First Amendment rights become rights of self-defense in the political arena. *See* Blasi, *The Pathological Perspective and the First Amendment,* 85 COLUM. L. REV. 449, 449-50 (1985). First Amendment rights "are means indispensable to the discovery and spread of political truth" and are a necessary predicate to "political change." *Whitney v. California,* 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring). For an unpopular and embattled minority, these rights are quite simply the ticket to continued participation in our self-governing democracy. They enable each citizen to remain a part of the collective "self" of self-governance. *See Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). And that ticket also creates the potential that its holder may someday be successful in bringing about political change. This is a desideratum in our political and constitutional structure. Indeed, it "*is* the theory of our Constitution." *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting). Without at least the potential for political change, First Amendment rights and, indeed, participation in the political processes of self-governance would become exercises in futility. And our government would likewise lose the capacity to adapt.

For those who would forever forestall such political change, the words of Justice Holmes are instructive: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Id.* Justice Holmes was discussing, not merely psychology, but political necessity. In order to forestall all potential for political change, one must disable the mechanisms of democracy, and that means suppressing First Amendment rights. The *Dred Scott* Court knew this when it suppressed the political voice even of emanci-

pated Blacks. And the drafters of Amendment 2 knew this as well.[10]

The making of a claim is a privilege of citizenship; the *Dred Scott* decision tells us this much. The making of a claim in an adjudicatory setting, whether judicial or administrative, is likewise expressive activity protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985). And lest there be any lingering doubt about the applicability of the First Amendment to the States, it is worth noting that, before the incorporation doctrine became second nature, this Court freely acknowledged that First Amendment rights are among "the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (at least, with an apparent nod to the *Slaughter-House* rule, when expression bears upon "national questions").

But claim-making also has a broader signification, one fairly synonymous with petitioning. *See McDonald*, 472 U.S. at 488 & n.2 (Brennan, J., concurring) (collecting cases showing different kinds of petitioning). And this broader sense is the one used in Amendment 2 for it prohibits claim-making in any and all conceivable pro-

[10] Petitioners, in their defense of Amendment 2, display the same mindset when they assert that Amendment 2 is the best way to deal with the divisive, political issue of gay people. Thus, Petitioners suggest that Amendment 2 is ultimately the best way because it uniformly denies protection to gay people and, at the same time, uniformly eliminates all further discussion of the issue. *See* Brief for Petitioners at 47-48. Colorado's ultimate solution for the "gay problem" is not only deeply offensive, it is not even Colorado's choice to make. The First Amendment long ago made the choice of remedies: Absent an emergency, " 'the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.' " *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)); *see Crist v. Murray*, 1995 U.S. LEXIS 3622, at *10 (May 30, 1995) (Scalia, J., concurring).

cedural settings[11] for proceedings by or before any and all conceivable governmental actors.[12] Petitioning, of course, is expressly protected by the Petition Clause of the First Amendment.

III. AMENDMENT 2 TRANSGRESSES THE FIRST AMENDMENT IN FOUR WAYS

Colorado's prohibition on claiming and petitioning directly transgresses the First Amendment in at least three well-settled ways, and in a fourth way that flows directly from the Petition Clause.

Content Restriction. First, it is long-since established territory that the First Amendment will not brook a speech prohibition that turns on the content of speech: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Colorado's Amendment 2 does not prohibit the making of all claims. The Amendment prohibits only the making of those claims that would seek protection for gay people on account of "minority status" or "protected status" (status in the sense of "homosexual, lesbian or bisexual orientation") or that would seek protection from "discrimination" based on such orientation, conduct, practices, or relationships. Claims seeking protection and freedom from all other kinds of discrimination may be made and entertained. Indeed, all other kinds of claims, whether having to do with discrimination or not, are left untouched. Only the making of claims with the content as specifically described in Amendment 2 is prohibited. Indisputably, Amendment 2 establishes an impermissible content restriction.

[11] All those procedures established under "any statute, regulation, ordinance or policy." Amendment 2.

[12] The "State of Colorado, . . . any of its branches or departments, . . . any of its agencies, political subdivisions, municipalities or school districts." Amendment 2.

Speaker Restriction. Second, the First Amendment will not brook a speech prohibition that distinguishes among speakers, permitting some speakers while barring other speakers. *See First Nat'l Bank v. Bellotti,* 435 U.S. 765, 784-85 (1978). By its terms, Amendment 2 describes the speakers it prohibits from making a claim as "any person or class of persons." The reference here to a certain "class of persons" betrays the intended speaker restriction. It is not difficult to understand which "class" of speakers might wish to petition for the protection of gay people. Indeed, this class of persons is twice specifically described in Amendment 2: all those persons of "homosexual, lesbian or bisexual orientation." The political reality is that it is gay people and only gay people who, in their own self-defense, will petition for the protection of gay people. The Colorado Supreme Court had no difficulty in finding that Amendment 2 capitalizes on this political reality and that, when it bars speakers described as a certain *class of persons,* the Amendment "expressly fences out" and "singles out" a "class of persons [consisting of] gay men, lesbians, and bisexuals." *Evans v. Romer,* 854 P.2d 1270, 1284 (1993). This interpretation of Colorado law by the Colorado high court is binding upon this Court.[13] And it likewise establishes beyond doubt the speaker restriction in Amendment 2.

Beyond statutory exegesis, the speaker restriction in Amendment 2 is readily apparent when one considers some of the important, foreseeable applications of the

[13] *See, e.g., North Carolina v. Butler,* 441 U.S. 369, 376 n.7 (1979); *Landmark Communs., Inc. v. Virginia,* 435 U.S. 829, 837 n.9 (1978); *Ward v. Illinois,* 431 U.S. 767, 772 (1977); *Eastlake v. Forest City Enters., Inc.,* 426 U.S. 668, 674 n.9 (1976); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 488 (1976); *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 256 (1974); *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974); *Wardius v. Oregon,* 412 U.S. 470, 477 (1973); *Groppi v. Wisconsin,* 400 U.S. 505, 507 (1971).

Amendment's speech prohibition. In future adjudicatory proceedings, whether in state or local court or before an administrative agency, a petitioner may wish to claim Federal equal protection or Colorado equal protection to be free of discrimination against gay people. *Even if that protection gives rise at most to rational basis scrutiny,* the petitioner's plea would clearly transgress Amendment 2's prohibition on making such claims. *See* State's opening brief, Colo. Sup. Ct., No. 93SA017 (State's concession regarding "supremacy problem"). Moreover, because of familiar rules of standing, in most cases, only a gay person could even assert such a claim. *See Bowers,* 478 U.S. at 188 n.2. At that point, standing rules and Amendment 2 will merge to silence gay people and only gay people. The speaker restriction is palpable.

Public Forum. Third, the First Amendment will not brook a speech prohibition that establishes discriminatory access to a public forum. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). Every proceeding where the Amendment 2 speech prohibition will apply will be, by definition, a government-provided forum (that is, all those fora provided for by "any statute, regulation, ordinance or policy"). And in many of the important, foreseeable applications of Amendment 2, this government forum will be an indisputably public forum. Consider Amendment 2's express mention of "school districts." The place for making a claim for the protection of gay people in school districts would naturally be at the school board meeting. Nearly two decades ago, this Court had no difficulty in declaring school board meetings to be public fora. *See City of Madison v. Wisconsin Employment Rels. Comm'n,* 429 U.S. 167, 169, 174-75 (1976). The same will be true of countless other governmental fora where Amendment 2's speech prohibition will be brought to bear: university trustee meetings, county board meetings, city council meetings, state legislative committee meetings, and on and on. The rollback of First Amendment rights is simply staggering.

Perhaps the most sinister application of Amendment 2 to a public forum will come if ever there is an attempt to submit a new round of petitions to the Colorado Secretary of State in order to use the initiative procedure, itself a form of public forum, to repeal Amendment 2. In that instance, Amendment 2's prohibition on certain kinds of petitioning could very well serve as a basis for enjoining such access to the initiative procedure. Or the Colorado Secretary of State (clearly one of the "departments" or "agencies" specified in Amendment 2) could very well be compelled to reject the initiating petitions as a violation of Amendment 2's petitioning prohibition.

Petition Clause. Finally, this case has serious distinct implications for the Petition Clause of the First Amendment. Over the years, the protections afforded by the Petition Clause have seldom been developed because these protections were frequently assumed to be subsumed within the protections afforded by the other clauses of the First Amendment. *See, e.g., McDonald*, 472 U.S. at 488 n.2 (Brennan, J., concurring). Serious recent legal scholarship disputes this assumption. *See, e.g.*, Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 143 n.2 (1986). There is no doubt that all the expression protected by the Petition Clause is also protected by the other clauses. The question is whether the Petition Clause provides additional protections, protections greater than or different from those of the other clauses. The language of the Petition Clause, its place in our constitutional structure, and the history of the Clause all suggest that it does. Indeed, the right to petition has been regarded as so important to our system of self-government that some have considered it *one of "the citizenry's two constitutional means* of approaching the government: periodic election and continual instruction through petitioning." *Id.* at 162 (footnote omitted, characterizing the views of John Quincy Adams).

All the expressive activity protected by the Petition Clause is almost by definition expression addressed to government. *See California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510-11 (1972) (all branches or levels of government, whether state or Federal). And the nature of that expression is by definition an appeal, a petitioning, by a constituent for the kind of "redress of grievances" that government can provide—in other words, for a meaningful response by government to its citizen. This language suggests that the Petition Clause is keenly interested in preserving, not only the citizen's right to make a petition, but also the government's ability to hear; to entertain; and if appropriate, to respond meaningfully to that petition. Whereas the Speech Clause may in some settings protect only the right to speak out, the Petition Clause also protects, in political matters, the right "to be heard." *California Motor*, 404 U.S. at 513. In structural terms, the Petition Clause is, as noted, necessary for the citizen's participation in self-government. Moreover, it is necessary "to preserve the informed operation of governmental processes." *Id.* at 516 (Stewart, J., concurring).

In 1984, the Court tended to make the alarming suggestion that, of these two constitutional means available to address government, only one remained: voting "at the polls." *See Knight*, 465 U.S. at 285. The narrow question before the *Knight* Court, however, was whether the First Amendment gave to citizens a "constitutional right to force the government to listen to their views." *Id.* at 283; *see also id.* at 285. The *Knight* Court rejected this asserted right to force government to listen, citing the difficulty of judicial definition and enforcement and pragmatic concern over the efficiency of conducting government. *See id.* Unwittingly, the *Knight* Court tended thereby to lend credence to a theory of the right to petition first developed by John C. Calhoun and other representatives of the slave states in their efforts to preserve slavery and stifle all further discussion of it. *See* Higgin-

son, *supra,* at 159-61, 165-66. Indeed, the debate at the time of the ratification of the Bill of Rights expressly confirmed a much different understanding of the right to petition. *See id.* at 155-56; *see also id.* at 156 n.98 ("right to consult Congress is non-binding, but Congress has responsibility never to shut its ears to petitions (statement of E. Gerry)").

In the present case, there is, however, no occasion for reconsidering the *Knight* holding. There is no need to posit a right to force government to listen in order to show Amendment 2's incompatibility with the Petition Clause. Amendment 2 operates in a different fashion. The Amendment prohibits governmental actors from listening to a petition and thereby informing themselves regardless of whether they are willing to listen. The Amendment disables even willing governmental listeners. Unlike the *Knight* case, there is no question of compelling government to listen. Amendment 2 eliminates the very capacity of government, irrespective of willingness, to listen to or even to receive a petition.

This is a serious dismantling of the accepted structure of self-government. All the petitioning prohibited by Amendment 2 is, seemingly, petitioning addressed to government. In this way, Amendment 2 presents a striking parallel with the Petition Clause itself. The two are virtually coextensive; all that which Amendment 2 prohibits is that which the Petition Clause protects. And Amendment 2 is designed, not only to suppress the petitioner, but also to disable every possible governmental actor in Colorado from even receiving—much less listening to, being informed by, entertaining, and meaningfully responding to—a claim for the protection of gay people. *See Evans,* 882 P.2d at 1355 (Scott, J., concurring). It is in this way a near perfect disabling of the political mechanisms of democratic self-governance—a step, as noted, the drafters of Amendment 2 had to take in order to forestall all potential for political change in the future.

CONCLUSION

For all these reasons, these Amici Curiae respectfully urge this Court to affirm the decision of the Colorado Supreme Court.[14]

Respectfully submitted,

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[14] Pursuant to Supreme Court Rule 37.3, the written consents of all parties to the filing of this Brief have been filed with the Clerk.

(22)

No. 94-1039

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, As Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKFEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Crawford v. Board of Education, 458 U.S. 527 (1982)	9
Hunter v. Erickson, 393 U.S. 385 (1969)	8
James v. Valtierra, 402 U.S. 137 (1971)	9, 10
Kramer v. Union Free School District, 395 U.S. 621 (1969)	6, 7, 9
Reitman v. Mulkey, 387 U.S. 369 (1967)	8
Reynolds v. Sims, 377 U.S. 533 (1964)	7, 8
Romer v. Evans, 854 P.2d 1270 (1993), *reaffirmed at* 882 P.2d 1335 (1994)	5
Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)	8, 9
STATE STATUTES AND REGULATIONS	
Colorado Revised Statutes, § 24-34-402.5	11
Executive Order No. D0035, December 10, 1990	11
Code of Colorado Regulations, 4 CCR 801-1, policy 11-1	11
Denver Municipal Code, Article IV, §§ 28-91 to 28-116 (1991)	11
Aspen Municipal Code § 13-98	11
Boulder Revised Code §§ 12-1-2 to 12-1-4	11

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BRIEF OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* of The American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") in support of the Respondents is filed with the written consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

AFSCME is a labor union with approximately 1.3 million members, most of whom are employees of state or local governments. AFSCME represents more than

three thousand individuals who are employed by state, county or municipal governments in the State of Colorado. Amendment 2 could directly affect these individuals as well as AFSCME.

SUMMARY OF ARGUMENT

At issue is whether the citizens of Colorado can amend the state constitution to prevent the concerns of gays, lesbians and bisexuals over discrimination in the workplace, housing and public accommodations from being addressed at any level of state government, at least until Amendment 2 is repealed. This constitutional amendment, approved by the electorate in November 1992, prohibits all branches of Colorado state and local government from passing or enforcing any law, resolution or policy that protects individuals from discrimination based upon their sexual orientation. The Colorado Supreme Court held that Amendment 2 violated the equal protection clause contained in the Fourteenth Amendment to the United States Constitution because it infringed upon the fundamental right of gays, lesbians and bisexuals to participate equally in the political process. In reaching this conclusion, the Colorado Supreme Court relied on this Court's decisions striking down state statutory and constitutional restrictions on the right to vote, on apportionment and reapportionment, on access to the ballot, and on candidate eligibility.

Petitioners contend that the Colorado Supreme Court was mistaken in relying on those cases, in part because the decisions do not enunciate a fundamental right to participate in the political process and in part because Amendment 2 works no deprivation of rights of constitutional proportion. Petitioners argue that Amendment 2 produces only an inconsequential deprivation of rights because gays, lesbians and bisexuals are still free to participate in the political process on issues unrelated to discrimination at all levels of government and on issues

related to discrimination through advocating a constitutional referendum to repeal Amendment 2.

While we believe that neither of Petitioners' contentions have merit, we limit our argument in this brief to Petitioners' second claim, that a partial deprivation is not of constitutional significance, because it is so contrary to AFSCME's experience. The ability of public employees to insure that decisions regarding their hiring, promotion, discipline and discharge will be based upon their workplace performance and not personal preference or prejudice is principally determined through bargaining, lobbying and political activism at the state and local levels of government. Amendment 2 singles out gays, lesbians and bisexuals and deprives them of the right to pursue their workplace concerns on an equal basis with all other Colorado public employees.

Discrimination against gays and lesbians has occurred in public employment in Colorado in the past and it can reasonably be expected to occur again in the future. If Amendment 2 becomes law, AFSCME will be unable to negotiate provisions into its collective bargaining agreements that limit discrimination based on sexual orientation. Similarly, the union will be unable to enforce existing grievance and arbitration procedures on behalf of gay, lesbian and bisexual members who are subject to discrimination, discipline or discharge because of their sexual orientation. As a practical matter, these contractual protections are meaningful only if they can be enforced in the administrative and judicial forums of local and state government. No one can reasonably expect a qualified candidate for promotion who is passed over because of his or her sexual orientation to obtain a remedy through a ballot initiative repealing Amendment 2. The loss of the right to participate fully in these political forums and the accompanying loss of workplace rights will erode the structure of fairness that should underlie the personnel decisions of public employers in the State of Colorado.

Nor, upon examination, does the case law support Petitioners' claim that Amendment 2 will work no significant deprivation of rights. Most of the cases the Colorado Supreme Court cited in support of its holding involve only a "partial" deprivation of the right to participate in the political process, much as in the case before this Court. In fact, the deprivation here is substantial and there is no constitutionally sound basis upon which to exile an independently identifiable group from such a significant part of the political process.

Petitioners' claim that Amendment 2 does little more than "withdraw a deeply divisive social and political issue from elected representatives and place its resolution squarely in the hands of the people" is a fallacy. Petitioners' Brief at 10. Amendment 2 hobbles the ability of gays, lesbians and bisexuals to effectively participate in the administrative and political mechanisms that are used most frequently by all citizens to achieve an orderly resolution of competing claims. This will not calm the political waters as the State would have us believe. Indeed, Petitioners do not even claim that Amendment 2 will bring a *resolution* to what they refer to as a deeply divisive social and political issue. Instead, the competing interests will continue to fight over their views. The only change will be that these struggles will no longer occur in the political forums our society has created for that end.

ARGUMENT

I.

Amendment 2 prohibits all branches of Colorado state and local government from passing or enforcing any law, regulation or policy that limits the right to discriminate against another because they are gay, lesbian or bisexual. Amendment 2 will supersede existing legal protections for gays, lesbians and bisexuals and prevent them from seeking similar protection in the future unless they first repeal this state constitutional amendment. The case law supports the conclusion that this is a constitutionally significant deprivation of rights, regardless of the "issue specific" nature of the deprivation and the fact that gays, lesbians and bisexuals retain the right to sponsor a constitutional ballot initiative to repeal Amendment 2.

The Colorado Supreme Court held that Amendment 2 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and affirmed the trial court's permanent injunction. *Romer v. Evans*, 854 P.2d 1270 (1993), *reaffirmed at* 882 P.2d 1335 (1994). In a 6-1 decision, the state court held that many of this Court's decisions articulate a fundamental right to political participation, and that strict scrutiny would be applied to any effort to restrict an independently identifiable group's right to participate equally in the political process. 854 P.2d at 1276. The state supreme court emphasized that this heightened protection is necessary to insure that all interests in society, including those of minorities, are guaranteed the right to participate effectively (as distinguished from successfully) in the process of government. In reaching that conclusion, the Colorado Supreme Court relied on decisions of this Court striking down limitations or preconditions on voting, on apportionment and reapportionment, on ballot access and on candidate eligibility.

Petitioners argue that the Colorado Supreme Court was in error, both because this Court has never articulated a

fundamental right to participate in the political process, and even if it had, Amendment 2 does not rise to the level of a constitutional deprivation. Petitioners' Brief at 18 & 25. In support of these arguments, they note that the group singled out in Amendment 2 retains the right to vote, the right to participate in state and local politics (at least to the degree the subject matter of their advocacy does not cross Amendment 2's limitations), and the right to seek protection from discrimination for gays, lesbians and bisexuals through a ballot initiative to repeal Amendment 2. Petitioners' Brief at 11-12. While neither of these arguments has merit, AFSCME's experience most strongly speaks to the error of the latter claim.

This Court has consistently held that the presence of an alternative, admittedly more difficult, forum will not save a statute that denies citizens the right to participate equally in the political process. This Court has struck down barriers to effective political participation in voting rights cases, in reapportionment cases, in ballot access cases and in candidate eligibility cases.[1] Nor does the case law support Petitioners' notion that it is of no concern (at least no concern of constitutional proportion) if a group is deprived of the right to participate in the political process, so long as it can return to the arena in which it has lost, to play the game again. Petitioners' Brief at 27.

In *Kramer v. Union Free School District*, 395 U.S. 621 (1969), this Court rejected an argument now advanced by Petitioners: depriving a group of the right to raise an issue in a particular forum is of no constitutional importance if there is another, more difficult forum in which it could participate.[2] The New York legislature had

[1] To the degree these cases are viewed as "fundamental rights" cases and "suspect class" cases, Petitioners' arguments have been rejected in both categories.

[2] In fact, we believe that Petitioners' argument conflicts with the entire method by which cases are categorized in this area of the law. By their very nature, the reapportionment cases address only a dilution of the right to vote and the participation cases involve the denial of the franchise in a limited context. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 568 (1964) and *Kramer v. Union Free School District*, 395 U.S. at 626 (emphasizing this distinction). In all of these cases, a violation of the equal protection clause was found, despite the fact that the disadvantaged group retained the right to participate in some more limited forum.

passed a statute that allowed for popularly elected school boards to administer primary and secondary education. The statute prohibited individuals from voting in school board elections unless they were property holders, citizens of the United States and at least 21 years of age. *Id.* at 632-33. Under Petitioners' analysis, these restrictions would amount to no more than the "division of authority . . . between state and local governing bodies" and a limited deprivation of rights on only certain issues. Petitioners' Brief at 3, 14 and 27. Certainly Justice Stewart, writing for the dissent in *Kramer*, believed this to be the case. Justice Stewart noted that Kramer retained the right to vote in New York State elections and to lobby to repeal the statute that limited his right to participate in school board elections. *Id.* at 639-40.

A majority of the *Kramer* Court took a quite different view. Justice Warren, writing for the majority, emphasized that caution is needed when statutes grant the franchise on a selective basis, for fear this will deny some citizens "any effective voice in the governmental affairs which substantially affect their lives." 395 U.S. at 627. The unconstitutional restriction on Kramer's right to vote was not diminished by the fact that the restriction was limited to the issue of school administration, nor by the fact that he retained the right to vote for state legislators who could restructure the political system to repair that deprivation. *Id.* at 621.

Similarly, when a ballot initiative in Washington State amended the state constitution to strip school boards of the power to order busing to achieve racial integration,

this Court held there was a violation of equal protection, despite the fact that minorities retained the right to lobby school boards on other issues and could have used the initiative process to repeal the offending amendment. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). This Court found that creating procedural barriers to the political process could unfairly burden rights, even when the deprivation was not complete. The majority opinion states that by transferring decisionmaking on busing from the local school boards to constitutional ballot initiatives, political participation was removed to a "new and remote level of government".[3] *Id.* at 483.

In fact, only rarely has this Court addressed a case where there has been a complete deprivation of the right to participate in the political process. In almost every instance, this Court has wrestled with impediments to participation. Frequently, these cases involve a minority of citizens who were deprived of the right to participate on only a single issue. In *Reitman v. Mulkey*, 387 U.S. 369, 377-78 (1967), a ballot initiative amended the state constitution to prohibit state or local governments from restricting housing discrimination. Petitioners would cast this as a simple restructuring of the state government to prevent state and local elected officials from legislating on a controversial social and political issue. Instead, this Court found it to be a violation of the equal protection clause. *See also, Hunter v. Erickson*, 393 U.S. 385 (1969) and *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Hunter* and *Reynolds*, this Court found a violation of

[3] This decision should put to rest the notion that a deprivation of rights under the equal protection clause is not reviewable if it is clothed as a restructuring of state powers. "In our view, Initiative 350 must fall because it does 'not attemp[t] to allocate governmental power on the basis of any general principle.' *Hunter v. Erickson*, 393 U.S., at 395 (Harlan, J., concurring). Instead it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Washington v. Seattle Schools*, 458 U.S. at 470.

the equal protection clause, even though the citizens—like the gay, lesbian and bisexual residents in Colorado—retained the right to advance a ballot initiative to repeal the offending provision in the state constitution. The presence of an alternative means of participation does not excuse the creation of structural impediments to participation.

Petitioners cite *Crawford v. Board of Education*, 458 U.S. 527 (1982), as dispositive of this case. Petitioners' Brief at 33. Yet they appear to misunderstand *Crawford* and how this Court distingiushed it from *Washington v. Seattle Schools*, which was argued and decided on the same day. 458 U.S. 457 & 527. Under the state constitutional amendment reviewed in *Crawford*, citizens retained the right to lobby for and pass legislation at the local level to end desegregation. The constitutional amendment in *Crawford* simply prevented California courts from interpreting the equal protection clause in the state constitution more broadly than they would interpret the equal protection clause in the U.S. Constitution. Justice Powell cited this as the central distinguishing feature between *Crawford* and *Seattle Schools*, because it preserved the right of citizens to participate equally in the political process on this issue at the state and local level. *Crawford*, 458 U.S. at 536, fn. 12. Thus, it was the continued presence of a right to participate fully in the political process that this Court cited in distinguishing permissible and impermissible burdens on political participation in *Crawford*, and not Petitioners' notion that a State may freely take away those rights it has earlier given.[4]

Similarly, in citing *James v. Valtierra*, 402 U.S. 137 (1971), Petitioners ask this decision to do more than

[4] Petitioners' theory that a State can unequally allocate the right to participate in a political forum if it has the power to revoke all citizens' right to participate in the forum was also rejected by this Court in *Kramer v. Union Free School District*, 395 U.S. at 629. There, the fact that school boards could be appointed rather than elected did not justify restricting the right to vote to property owners.

it is able. The statute under review in *James* placed a burden on a minority of the voters—those seeking public housing—because approval of additional public housing was conditioned upon a referendum vote in the county, town or city where the housing would be located. *Id.* 402 U.S. at 139. However, this Court found the requirement of a local referendum on this issue did not fence out any independently identifiable groups from political participation. In contrast, Amendment 2 will remove precisely the sort of community control and community political process that was upheld in *James*.

In short, to require that a group of citizens pursue its political interests only through a state constitutional amendment is a deprivation of rights of constitutional proportion. There is simply no merit to the claim that such a deprivation is minor, inconsequential or immune from review when framed as an ordering of the operation of state government.

II.

Amendment 2 will work a significant and substantial deprivation of rights in the employment context. The fair and efficient delivery of public services is centered on the principle that employees will be judged in hiring, transfer, promotion, discipline and discharge on their conduct in the workplace, and not upon personal traits, off-duty conduct, friendships, familial ties or other characteristics that are not work-related. Most frequently, these principles are established and enforced at a state or local level.

These principles are embodied in statutes, ordinances, regulations and union contracts. These legislative and contractual provisions give citizens a means of enforcing these principles against countervailing forces of arbitrariness, prejudice and self-interest. These protections appear as an affirmative pledge, frequently in the context of a

merit system adopted by a state or local government.[5] In union contracts, these principles sometimes appear in clauses that limit an employer's right to discipline and discharge employees to those situations where there is just cause to support such severe sanctions. In other circumstances they may require the employer to make promotional decisions or work assignments based on qualifications and/or seniority. These principles are also embodied in statutes, ordinances, executive orders and union contracts in the form of prohibitions on discrimination on the basis of sexual orientation.[6]

One of AFSCME's goals is to ensure that all workers are treated with fairness and dignity in the workplace. AFSCME's affiliates routinely bargain for contractual provisions tailored to the specific concerns or needs of our members at a particular worksite. These include anti-discrimination provisions to insure that individuals are not singled out for mistreatment due to non-job related characteristics, including sexual orientation, disabilities, or religious concerns. All of these provisions are the result of an orderly process of resolving workplace conflicts.

Amendment 2 will nullify these provisions by limiting access to or negating the mechanisms that create or enforce these rights. Without access to the union grievance procedure, internal administrative dispute resolution systems and ultimately the courts, there is no legitimate forum for these workplace disputes. It does not mean that the disputes go away, or that the concerns of gays, lesbians or bisexuals disappear. It simply means that the

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[5] *See, e.g.*, Colo. Rev. Stat. § 24-34-402.5 (unfair employment practice to terminate employment due to off premises lawful conduct.)

[6] *See, e.g.*, Executive Order No. D0035, December 10, 1990; Code of Colorado Regulations, 4 CCR 801-1, policy 11-1; Denver Mun. Code Art. IV, §§ 28-91 to 28-116 (1991); Aspen Mun. Code § 13-98; and Boulder Rev. Code §§ 12-1-2 to 12-1-4.

orderly mechanisms the state has created to resolve these disputes will be unavailable.

It is no answer to individuals who have been discharged because of their sexual orientation, rather than their work performance, to tell them they can seek a state ballot initiative to repeal Amendment 2 to remedy their discharge. For employees passed over for promotion or given a suspension rather than a reprimand because they are gay, lesbian, or bisexual, the chief remedy exists at the local level, as it does for all employees. The concerns of these employees for fairness will have no forum if Amendment 2 becomes the law of Colorado. The end result will be that able employees will be subject to irrational treatment and the effectiveness of the work force will suffer.

CONCLUSION

For the foregoing reasons, the decision and judgment of the Colorado Supreme Court in this case should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE COLORADO PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF FACTS	5
INTRODUCTION AND SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE NATURE OF SEXUAL ORIENTATION	9
A. The Definition Of Sexual Orientation	9
B. The Prevalence Of Homosexual Orientation	11
C. The Development Of Sexual Orientation	12
D. Can Sexual Orientation Be Changed?	14
E. Homosexuality Is Not A Disorder And Does Not Affect One's Ability To Contribute To Society	15
II. GAY PEOPLE HAVE LONG FACED INTENSE PREJUDICE AND DISCRIMINATION BASED ON IGNORANCE AND STEREOTYPES	18
A. History And Prevalence Of Prejudice And Discrimination Against Gay People	19
B. The Nature Of Anti-Gay Prejudice	22
C. Effects Of Prejudice And Discrimination	24
CONCLUSION	27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1039

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE COLORADO PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE [1]

The American Psychological Association, a scientific and professional organization founded in 1892, is the major association of psychologists in the United States. It has more than 120,000 members and affiliates, including the vast majority of psychologists holding doctoral

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

degrees from accredited universities in the United States. The Colorado Psychological Association, founded in 1946, represents more than 700 psychologists in the State of Colorado. The American Psychiatric Association, founded in 1844, is the Nation's leading organization of physicians specializing in psychiatry, with approximately 40,000 members. The National Association of Social Workers ("NASW") was established in 1955 as a nonprofit professional association. It is the largest social-work association in the world, with more than 160,000 members. Together, the four *amici* represent the majority of mental health care providers in this country.

Amici submit this brief to bring to this Court's attention the principal body of professional research pertinent to the questions posed in this case. Gay men and lesbians have been subjected to widespread discrimination based on prejudice, myths, and stereotypes.[2] *Amici* believe that this Court's consideration of this case will be aided by presentation of the literature demonstrating the baselessness of, and harms caused by, such discrimination.

Amici have publicly and formally urged the elimination of irrational discrimination against gay men and lesbians on many occasions. Beginning in 1975, the Council of Representatives of *amicus* American Psychological Association passed a series of resolutions urging that gay men and lesbians not be discriminated against in employment, housing, licensing, public accommodation, and child custody.[3] In 1988, the association approved a

[2] As used in this brief, the terms "gay" and "lesbian" describe men and women, respectively, whose sexual orientation is based on their primary sexual, emotional, or romantic attraction to members of their own sex. *See generally* John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications for Public Policy* 1, 1-12 (John C. Gonsiorek & James D. Weinrich eds., 1991) [hereinafter *Homosexuality*]; Terry S. Stein, *Overview of New Developments in Understanding Homosexuality*, 12 Rev. Psychiatry 9, 10-12 (1993).

[3] *See, e.g.*, American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 32 Am. Psychologist 408, 432 (1977); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 36 Am. Psychologist 552, 581 (1981).

resolution recognizing the "profound psychological consequences" of "hate crimes" motivated by anti-gay prejudice and urging governmental action to reduce such bias-related crimes and to eliminate "policies that perpetuate them."[4] The following year, the organization reaffirmed "its opposition to laws criminalizing consensual adult sexual behavior in private."[5] On August 22, 1993, the Association's Council of Representatives passed a resolution condemning Amendment 2 and any other state-law provisions purporting to bar legislation against sexual-orientation discrimination, declaring that "there is no basis for such discrimination and such discrimination is detrimental to mental health and the public good."[6]

Amicus American Psychiatric Association in 1973 formally declared that homosexuality "does not constitute a psychiatric disorder"[7] and "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[8] The organization opposed "all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation,

[4] American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 43 Am. Psychologist 527, 528 (1988).

[5] American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 44 Am. Psychologist 1026, 1026 (1988).

[6] American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 49 Am. Psychologist 628, 628 (1994).

[7] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-II)* § 302.0, at 44 (6th prtg. 1974).

[8] *Resolution of the American Psychiatric Association* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974).

and licensing" and urged the repeal of laws "singling out homosexual acts by consenting adults in private" and the enactment of laws affording "homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc.," citing "the pervasive discriminatory acts directed against this group and the arbitrary and discriminatory laws directed against homosexual behavior." [9] The American Psychiatric Association has opposed "exclusion and dismissal from the armed services on the basis of sexual orientation" and the placement on homosexuals of any special "burden of proof of judgment, capacity, or reliability"; [10] has opposed "the discriminatory exclusion of homosexual visitors and immigrants to the United States"; [11] and has supported "the right to privacy in . . . adult consensual sexual relations conducted in private." [12] In 1992, the organization reaffirmed that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" and called for the repeal of laws penalizing private adult homosexual acts and the taking of action "to decrease the stigma related to homosexuality wherever and whenever it may occur." [13]

Amicus National Association of Social Workers has likewise formally opposed discrimination against gay men and lesbians. In 1977, the NASW adopted its first policy statement on gay issues,[14] which was subsequently revised and expanded in 1987 [15] and again in 1993.[16] As noted

[9] *Id.*

[10] 148 Am. J. Psychiatry 552 (1991).

[11] 148 Am. J. Psychiatry 1625 (1991).

[12] 149 Am. J. Psychiatry 724 (1992).

[13] 150 Am. J. Psychiatry 686 (1993).

[14] NASW, *Policy Statement on Gay Issues* (approved by NASW Delegate Assembly, 1977).

[15] NASW, *Policy Statement on Lesbian and Gay Issues* (approved by NASW Delegate Assembly, 1987).

[16] NASW, *Policy Statement on Lesbian and Gay Issues* (approved by NASW Delegate Assembly, 1993).

in the 1993 statement, the NASW *Code of Ethics* prohibits social workers from discriminating on the basis of sexual orientation in their professional roles.[17] The current NASW policy also affirms the association's commitment "to work toward full social and legal acceptance and recognition of lesbian and gay people." [18] Other professional organizations have adopted similar policies.[19]

STATEMENT OF FACTS

On November 3, 1992, a majority of Colorado voters approved a state constitutional amendment ("Amendment 2") that provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Sec-

[17] *See* NASW, *Code of Ethics of the National Association of Social Workers* (1993).

[18] NASW, *Policy Statement on Lesbian and Gay Issues* (approved by NASW Delegate Assembly, Aug. 1993), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162, 163 (3d ed. 1994).

[19] *See, e.g.*, American Medical Association, *Reports of Board of Trustees*, Annual Meeting of the House of Delegates (June 1993) ("AMA policy is unequivocal—discrimination based on sexual orientation is improper and unacceptable by any part of the federation of medicine."); American Bar Association Report No. 8, House of Delegates (1989) (resolution "urg[ing] . . . governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations").

tion of the Constitution shall be in all respects self-executing.

Colo. Rev. Stat., Const. art. II, § 30b (1994 Supp.).

The Amendment by its terms prevents the State or any of its political subdivisions from adopting any law protecting gay men, lesbians, and bisexuals against discrimination—apparently leaving the State and its subdivisions at liberty to adopt policies that *do* discriminate against gay men, lesbians, and bisexuals. Amendment 2 on its face does not apply neutrally to sexual orientation of all kinds (homosexual, bisexual, and heterosexual). It had the specific purpose and effect of amending a number of existing laws and policies that safeguarded Coloradans against discrimination based on sexual orientation by deleting those protections as applied to gay men, lesbians, and bisexuals. The Amendment, if enforced, also would preclude state and local public entities throughout Colorado from adopting any new remedies for anti-gay discrimination.

On November 12, 1992, respondents filed suit in Colorado state court under 42 U.S.C. § 1983, challenging the constitutionality of Amendment 2. The Denver District Court granted the respondents' motion for a preliminary injunction against the enforcement of Amendment 2. *See* Pet. App. E. In *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993), the Colorado Supreme Court affirmed the entry of the preliminary injunction, and held that Amendment 2 is subject to strict scrutiny because it "fences out" an independently identifiable class of persons and infringes upon their fundamental right to participate equally in the political process, a right protected by the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1282-83, 1285 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964), *Hunter v. Erickson*, 393 U.S. 385 (1969), and their progeny) (Pet. App. D-25 to D-27).

Following an eight-day trial, the district court permanently enjoined the enforcement of Amendment 2. *See* Pet. App. C. The Colorado Supreme Court again affirmed, holding that Amendment 2 was subject to strict scrutiny and was not narrowly tailored to serve any compelling governmental interest. *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (Pet. App. B-24). Because the Colorado Supreme Court held that Amendment 2 infringes on a fundamental right and is therefore subject to strict scrutiny, it did not address respondents' argument that Amendment 2 should be invalidated even under the rational-basis test. *See id.* at 1341 n.3 (Pet. App. B-6 n.3).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves two legal standards. First, based on this Court's decision in *Hunter v. Erickson, supra*, the Colorado Supreme Court concluded that gay men, lesbians, and bisexuals constitute an "independently identifiable group" whose right to participate equally in the political processes of Colorado and its subdivisions would be infringed by the enforcement of Amendment 2. 882 P.2d at 1341, 1349-50 (Pet. App. B-7, B-24). An "identifiable group" has been described as one "defined in terms of some characteristic that is not ordinarily a legitimate basis for the allocation of political authority." Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 11 (1994).

Second, respondents argue that Amendment 2 can be invalidated under rational-basis review. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).[20] Under that standard, government action fails to pass muster not only if it lacks a "footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), but also if it is based predominantly on invidious prejudice or unreasoned

[20] *See also Pruitt v. Cheney*, 963 F.2d 1160, 1164-66 (9th Cir. 1991) (citing *Cleburne* and applying rational-basis review to Army regulations that discriminated on the basis of sexual orientation), *cert. denied*, 113 S. Ct. 655 (1992).

antipathy, or if it reflects blind adherence to unfounded stereotypes. *See Cleburne*, 473 U.S. at 446-47 (the "bare . . . desire to harm a politically unpopular group" is never a legitimate state interest (internal quotation marks omitted)); *id.* at 448-50 ("mere negative attitudes," "vague, undifferentiated fears," "irrational prejudice," and "'[p]rivate biases'" are not permissible bases for discriminatory state action (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))); *Stanton v. Stanton*, 421 U.S. 7, 13-15 (1975) ("role-typing" and "old notions" cannot provide a rational basis for a discriminatory state law); *see also Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *USDA v. Moreno*, 413 U.S. 528, 534-35 (1973).

In this brief, *amici* present two bodies of scholarly literature that are relevant to the Court's consideration of these issues. We begin with a discussion of the latest scientific research on the nature of sexual orientation. This research firmly and consistently rejects the widespread assumptions that sexual orientation is the same as sexual conduct, that sexual orientation is freely chosen and readily subject to alteration, and that homosexual or bisexual orientation is a mental disorder causing impairment of psychological or social functioning.

We then discuss the literature on prejudice and discrimination against gay people. Prejudice directed against gay people as a group has led to harmful, and sometimes violent, acts of purposeful discrimination. Measured by a variety of standards—from research on public attitudes to statistics on hate crimes—lesbians and gay men remain subject to intense societal prejudice and discrimination, both public and private, largely growing out of inaccurate stereotypes and causing serious harm.

ARGUMENT

I. THE NATURE OF SEXUAL ORIENTATION.

A. The Definition Of Sexual Orientation.

Behavioral and social scientists commonly identify sexual orientation as one of several distinct but related components of human sexuality.[21] Sexual orientation refers to the tendency to experience erotic or romantic responses to men, women, or both, and the resulting sense of oneself.[22] Sexual orientation is generally classified as heterosexual, bisexual, or homosexual, with the range sometimes viewed as a continuum.[23] Sexual orientation has a number of aspects, including experiencing an ongoing attraction to persons of a particular gender; developing a private personal identity or self-concept as heterosexual, gay, lesbian, or bisexual; establishing a public identity based on sexual orientation; and identifying with a community of those who share the same sexual orientation.[24]

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[21] Other components of human sexuality are biological sex, gender identity (the psychological sense of being male or female), and social sex role (adherence to cultural norms for masculine or feminine behaviors and attitudes). *See* John Money & Anke A. Ehrhardt, *Man & Woman, Boy & Girl: Differentiation and Dimorphism of Gender Identity from Conception to Maturity* 1-23 (1972); Michael Shively & John P. De Cecco, *Components of Sexual Identity*, 3 J. Homosexuality 41, 41-48 (1977), *reprinted in Psychological Perspectives on Lesbian and Gay Male Experiences* 84-87 (Linda D. Garnets & Douglas C. Kimmel eds., 1993) [hereinafter *Psychological Perspectives*]; Stein, *Overview*, *supra*, at 10-11.

[22] *See* Gonsiorek & Weinrich, *supra*, at 1-12; Shively & De Cecco, *supra*; Stein, *Overview*, *supra*, at 11; William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 Archives Gen. Psychiatry 228, 229 (1993).

[23] *See, e.g.*, Shively & De Cecco, *supra*; Byne & Parsons, *supra*.

[24] *See* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 134 (1991).

Sexual orientation is distinct from sexual conduct.[25] The fact that a person engages in same-sex sexual activity, other-sex sexual activity, both, or neither is not sufficient to determine his or her sexual orientation; indeed, "[a]ny definition of sexuality based solely on behavior is bound to be deficient and misleading."[26] Thus, many individuals who identify themselves as gay or lesbian, or who are predominantly attracted to members of the same sex, nonetheless engage in other-sex sexual behavior.[27] Similarly, many persons who identify themselves as heterosexual engage in same-sex sexual behavior.[28] As in the case of heterosexuals, some people who identify themselves as gay or lesbian do not engage in any sexual activity at all.[29] Some gay male and lesbian relationships, again like

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[25] *See, e.g.*, John Money, *Sin, Sickness, or Status? Homosexual Gender Identity and Psychoneuroendocrinology*, 42 Am. Psychologist 384 (1987), *reprinted in Psychological Perspectives, supra*, at 133-34; Terry S. Stein, *Afterword to Section I*, 12 Rev. Psychiatry 127, 127 (1993); Byne & Parsons, *supra*, at 229.

[26] Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 221 (1994); *see also* Edward O. Laumann, John H. Gagnon, Robert T. Michael & Stuart Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* 311-12 (1994). The Laumann study, based on a survey of a representative sample of American adults between the ages of 18 and 60 and conducted by the National Opinion Research Center at the University of Chicago, is hereinafter referred to as the "NORC Study."

[27] *See* NORC Study, *supra*, at 311-12.

[28] *See id.* at 310-12; Lynda S. Doll, Lyle R. Petersen, C.R. White, E.S. Johnson, J.W. Ward & The Blood Donor Study Group, *Homosexually and Nonhomosexually Identified Men Who Have Sex with Men: A Behavioral Comparison*, 29 J. Sex Res. 1, 1-14 (1992); Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, *Sexual Behavior in the Human Male* 623-30 (1948); Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin & Paul H. Gebhard, *Sexual Behavior in the Human Female* 474-75 (1953).

[29] *See* NORC Study, *supra*, at 312 n.29; Milton Diamond, *Homosexuality and Bisexuality in Different Populations*, 22 Archives Sexual Behav. 291 (1992).

their heterosexual counterparts, do not include an overtly sexual component.[30]

B. The Prevalence Of Homosexual Orientation.

Few generalizable estimates exist of the prevalence of homosexual orientation in the United States.[31] Among existing surveys on sexuality, estimates differ substantially depending upon (among other things) whether the researcher inquires into same-sex sexual conduct, sexual orientation measured in terms of enduring attraction, or self-reported sexual identity. The renowned study of sexuality recently released by the National Opinion Research Center at the University of Chicago is illustrative. In that survey, 4.9% of men and 4.1% of women reported having had sex with a same-sex partner since age eighteen.[32] A larger proportion of respondents—7.7% of the men and 7.5% of the women—reported experiencing attraction to persons of their own sex, considering the prospect of sex with a same-sex partner appealing, or both.[33] When respondents were asked whether they thought of themselves as "heterosexual, homosexual, bisexual, or something else," 2.8% of the male respondents

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[30] *See* Letitia Anne Peplau & Susan D. Cochran, *Value Orientations in the Intimate Relationships of Gay Men*, 6 J. Homosexuality 1 (1990).

[31] This scarcity is due in part to practical research problems, particularly many individuals' unwillingness to acknowledge homosexual orientation even in anonymous surveys, which compound the usual difficulties of eliciting accurate survey data on sexual matters. *See, e.g.*, NORC Study, *supra*, at 284 (noting that, due to social stigma attached to same-sex sexual activity and homosexual orientation, survey data on these subjects are "no doubt lower-bound estimates"); *id.* at 301 ("[T]he measurement of same-gender practices and attitudes is crude at best, with unknown levels of underreporting for each . . . .").

[32] *Id.* at 303; *see also* Robert E. Fay, Charles F. Turner, Albert D. Klassen & John H. Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 Science 338 (1989).

[33] NORC Study, *supra*, at 305.

and 1.4% of the female respondents identified themselves as "homosexual" or "bisexual."[34] The Chicago researchers found a significantly higher prevalence of self-reported homosexual or bisexual identity (9.2% for men, 2.6% for women) among residents of the twelve largest American cities.[35]

C. The Development Of Sexual Orientation.

Current professional understanding is that the core feelings and attractions that form the basis for adult sexual orientation typically emerge by early adolescence.[36] For some people, adult homosexual orientation is predictable by early childhood.[37] Developmental precursors of

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[34] *Id.* at 300-01, 305. Other studies have found a somewhat greater prevalence of self-reported gay or lesbian identity. *See* Stuart Elliott, *A Sharper View of Gay Consumers*, N.Y. Times, June 9, 1994, at D-1, D-17 (reporting results of nationwide Yankelovich Monitor survey finding that 5.7% of respondents identified themselves as gay or lesbian); Murray J. Edelman, *Understanding the Gay and Lesbian Vote in '92*, Pub. Persp., Mar.-Apr. 1993 (reporting exit poll research by the University of Connecticut's Roper Center, finding that between 2.4% and 3.0% of voters in 1992 elections reported that they were lesbian, gay, or bisexual); *Results of Poll*, S.F. Examiner, June 6, 1989, at A-19, A-20 (6% of nationwide sample self-reported as gay or lesbian in random telephone survey).

[35] *See* NORC Study, *supra*, at 305-07.

[36] *See* Alan P. Bell, Martin S. Weinberg & Sue Kiefer Hammersmith, *Sexual Preference: Its Development in Men and Women* (1981).

[37] *See* J. Michael Bailey & Kenneth J. Zucker, *Childhood Sex-Typed Behavior and Sexual Orientation: A Conceptual Analysis and Quantitative Review*, 31 Developmental Psychol. 43 (1995); Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. Psychiatry & L. 537 (1988); Richard Green, *The "Sissy Boy Syndrome" and the Development of Homosexuality* 370 (1987). Dr. Richard Green, a UCLA psychiatry professor specializing in human sexuality and psychosexual development in children, testified at trial. *See* Pet. App. C-17; Trial Tr. at 242-340.

adult homosexual orientation, however, have not been consistently identified for the population as a whole.[38]

A number of researchers have found familial patterns and biological correlates of adult homosexual orientation, suggesting that genetic, congenital, or anatomical factors may contribute to its development. For example, recent studies have indicated a linkage between certain aspects of DNA and sexual orientation.[39] Studies of identical twins have found that "heritabilities were substantial under a wide range of assumptions."[40] Another study, as yet unreplicated, reported differences between heterosexual and gay men in the volume of a cell group in the anterior hypothalamus, a brain structure that is involved in sexual behavior.[41] A study published earlier this year suggests that women who had been exposed to certain prenatal estrogens are more likely to be lesbian

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[38] *See* Bell et al., *supra*, at 193-211.

[39] *See* Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu & Angela M.L. Pattatuci, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 Science 321 (1993); *see also* William J. Turner, *Homosexuality, Type 1: An Xq28 Phenomenon*, 24 Archives Sexual Behav. 109 (1995).

[40] J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Archives Gen. Psychiatry 1089, 1089 (1991). Bailey and Pillard's study, which has since been replicated, found that, where one monozygotic ("identical") twin was gay, the other was also gay in 52% of the cases; where one dizygotic ("fraternal") twin was gay, the other was also gay in 22% of the cases; and where one brother by adoption was gay, his adoptive brother was gay in just 11% of the cases. *Id.*; *see also* J. Michael Bailey, Richard C. Pillard, Michael C. Neale & Yvonne Agyei, *Heritable Factors Influence Sexual Orientation In Women*, 50 Archives Gen. Psychiatry 217 (1993); J. Michael Bailey & Deana S. Benishay, *Familial Aggregation of Female Sexual Orientation*, 150 Am. J. Psychiatry 272 (1993); Frederick L. Whitam, Milton Diamond & James Martin, *Homosexual Orientation in Twins: A Report of 61 Pairs and Three Triplet Sets*, 22 Archives Sexual Behav. 187 (1993).

[41] *See* Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 Science 1034 (1991); *see also* Simon LeVay, *The Sexual Brain* (1993).

or bisexual.[42] Another study has suggested an "interactionist" model, under which "genetic factors can be conceptualized as indirectly influencing the development of sexual orientation." [43]

The available studies of gay experience indicate that same-sex attractions generally emerge by early or mid-adolescence.[44] "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active." [45] The scientific literature thus strongly indicates that sexual orientation is far from being a voluntary choice.[46]

D. Can Sexual Orientation Be Changed?

The research and clinical experience of *amici*'s members indicates that, once established, sexual orientation is resistant to change. Although there are some reports of therapy leading to changed sexual orientation, there is little evidence that treatment actually changes sexual attractions, as opposed to reducing or eliminating same-sex sexual *behavior*. Upon reviewing reports on "conversion therapy," one scholar concluded that—entirely aside from

[42] *See* Heino F.L. Meyer-Bahlburg, Anke A. Ehrhardt, Laura R. Rosen & Rhoda S. Gruen, *Prenatal Estrogens and the Development of Homosexual Orientation*, 31 Developmental Psychol. 12 (1995).

[43] Byne & Parsons, *supra*, at 237; *see also* Ray Blanchard, Kenneth J. Zucker, Susan J. Bradley & Caitlin S. Hume, *Birth Order and Sibling Sex Ratio in Homosexual Male Adolescents and Probably Prehomosexual Feminine Boys*, 31 Developmental Psychol. 22 (1995).

[44] *See* Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. Homosexuality 43, 43-73 (1989) (reviewing research literature); Bell *et al.*, *supra*, at 186-87.

[45] Bell *et al.*, *supra*, at 186.

[46] *See* Money, *supra*, *reprinted in Psychological Perspectives*, *supra*, at 131 ("The concept of voluntary choice is as much in error here as in its application to handedness or native language.").

the ethical concerns relating to any such therapy—there is no reliable evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention." [47]

E. Homosexuality Is Not A Disorder And Does Not Affect One's Ability To Contribute To Society.

The psychiatric, psychological, and social-work professions do not consider homosexual orientation to be a disorder.[48] More than twenty years ago, *amicus* American Psychiatric Association removed "homosexuality" from its list of mental disorders, stating that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." [49] In 1975, *amicus* American Psychological Association took the same position, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.[50]

[47] Haldeman, *Practice and Ethics*, *supra*, at 224; *see* Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *Homosexuality*, *supra*, at 149, 149-60; *cf.* Richard A. Isay, *Dynamic Psychotherapy With Gay Men: Developmental Considerations*, 12 Rev. Psychiatry 85, 86 (1993) ("efforts to change core sexuality are futile").

[48] A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* at xxi (1st prtg. 1994).

[49] *Resolution of the American Psychiatric Association* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974). At trial, Dr. Judd Marmor, the former president of the American Psychiatric Association, testified about the process that led to the Association's decision to remove homosexuality from its list of mental disorders. *See* Trial Tr. at 390-98.

[50] *See* American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

Amicus National Association of Social Workers has a similar policy.[51]

The declassification of homosexual orientation as a mental disease reflects the results of extensive research, conducted over three decades, showing that homosexual orientation is not a psychological maladjustment.[52] A comprehensive literature on the subject demonstrates that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both."[53] It is well established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."[54] The social and other circumstances in which lesbians and gay men live, including exposure to widespread and intense prejudice and discrimination, often cause acute distress; but there is no reliable evidence that homosexual orientation *per se* impairs psychological functioning[55] or

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[51] *See* NASW, *Policy Statement on Lesbian and Gay Issues* (approved by NASW Delegates Assembly, Aug. 1993), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162, 162-65 (3d ed. 1994).

[52] *See* John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality, supra*, at 115, 115-36; Bernard F. Reiss, *Psychological Tests in Homosexuality*, in *Homosexual Behavior: A Modern Reappraisal* 296 (Judd Marmor ed., 1980); Maureen Hart, Howard Roback, Bennett Tittler, Larry Weitz, Barbara Walston & Embry McKee, *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 J. Clinical Psychiatry 604 (1978).

[53] Gonsiorek, *Empirical Basis, supra*, in *Homosexuality, supra*, at 136.

[54] *Id.; see also* John C. Gonsiorek, *Results of Psychological Testing on Homosexual Populations*, 25 Am. Behavioral Sci. 385, 394 (1982); Reiss, *supra*, in *Homosexual Behavior: A Modern Reappraisal, supra*, at 296; Hart *et al., supra*.

[55] As one research psychologist explained:

> [M]any lesbians and gay men face difficult situations in their day-to-day lives as a result of the stigma attached to their sexual orientation. . . . [S]ome lesbians and gay men experience these situations as stressful and develop psychological problems as a consequence. In particular, the pressure to hide one's sexual orientation and the threat of physical assaults and other hate crimes can have many negative effects, including psychological and physical pain. However, empirical data do not indicate that lesbians and gay men, as a group, show a greater propensity to psychological dysfunction than do heterosexuals.

Herek, *Myths, supra*, at 145 (citing Mark Freedman, *Homosexuality and Psychological Functioning* (1971); Gonsiorek, *Results, supra*; Gonsiorek, *Empirical Basis, supra*, in *Homosexuality, supra*; Hart *et al., supra*; Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techs. 18 (1957); Reiss, *supra*, in *Homosexual Behavior: A Modern Reappraisal, supra*).

workplace functioning.[56]

The literature also undermines negative assumptions about gay men and lesbians as parents. One study commented: "The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies."[57]

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[56] *See, e.g.*, William P. Snyder & Kenneth L. Nyberg, *Gays and the Military: An Emerging Policy Issue*, 8 J. Pol. & Mil. Soc. 71, 77-79 (1980) (summarizing research and finding that gay people and heterosexuals score about the same in job stability and job satisfaction); Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 141-48 (1978). Many major corporations and other organizations have implemented nondiscrimination policies as to sexual orientation. *See, e.g.*, Kara Swisher, *Area Firms Lauded on Gay Bias Policies*, Wash. Post, Oct. 11, 1994, at C2, C2 (reporting that 31 of metropolitan Washington's 50 largest publicly-held companies have such policies).

[57] G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality, supra*, at 197, 213; *see also, e.g.*, Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025 (1992); David K. Flaks, Ilda Ficher, Frank Masterpasqua & Gregory Joseph, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Developmental Psychol. 105 (1995); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or*

And being raised by gay parents does not appear to cause homosexual orientation.[58]

II. GAY PEOPLE HAVE LONG FACED INTENSE PREJUDICE AND DISCRIMINATION BASED ON IGNORANCE AND STEREOTYPES.

Sexual orientation (whether heterosexual, homosexual, or bisexual) not only is a fundamental facet of one's experience and sense of self, but has long had immense social, and therefore personal, consequences. In a society in which the vast majority of people are not gay, and often intensely disapprove of those who are,[59] homosexual orientation that is or might be readily known to other people has enormous social implications. Homosexual orientation often becomes the *predominant* social identifier of gay people.[60] Particularly in places in which

Transsexual Parents, 135 Am. J. Psychiatry 692 (1978); Martha Kirkpatrick, Catherine Smith & Ron Roy, *Lesbian Mothers and Their Children: A Comparative Study*, 51 Am. J. Orthopsychiatry 545 (1981).

[58] *See* Herek, *Myths*, *supra*, at 157-61 (summarizing research); Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, 18 J. Homosexuality 137 (1989), *reprinted in Psychological Perspectives*, *supra*, at 442; J. Michael Bailey, David Bobrow, Marilyn Wolfe & Sarah Mikach, *Sexual Orientation of Adult Sons of Gay Fathers*, 31 Developmental Psychol. 124, 124-29 (1995) (finding that, of the gay fathers' sons whose sexual orientations could be rated, more than 90% were heterosexual, and that the sons' sexual orientation was unrelated to the amount of time they had spent living with their fathers).

[59] *See infra* pp. 21-22.

[60] This has been a chief premise of the Department of Defense's rationale for excluding openly gay people from military service, namely, that *heterosexual* soldiers would be so disturbed by the presence of openly gay people that their presence would pose a threat to military order and morale. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (Army argued that exclusion is justified because it avoids " 'tensions between known homosexuals and other members . . . who despise/detest homosexuality' " (quoting the Army's brief)), *cert. denied*, 498 U.S. 957 (1990).

openly gay people are few, a gay man or lesbian is likely to be thought of distinctly in terms of his or her sexual orientation, even in settings in which it is not demonstrably relevant.[61] As a result, "the experience of being gay, lesbian, [or] bisexual in American society today continues, to a large extent, to be defined by the requirement to cope with the negative effects of prejudice against homosexuality."[62]

A. History And Prevalence Of Prejudice And Discrimination Against Gay People.

The Denver District Court correctly observed that there is a long "history of discrimination against homosexuals." Pet. App. C-18. Gay people historically have been subject to intense prejudice and discrimination, both public and private. Extreme prejudice and even persecution were common in Europe from at least the Middle Ages.[63] Here in America, social prejudice and discrimination against lesbians and gay men have been widespread since colonial times.[64] Indeed, "lesbians and gay males have

[61] *See, e.g.*, Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *Homosexuality*, *supra*, at 60, 66-72 (describing process of anti-gay stereotyping); *id.* at 61 (discussing 1987 Roper poll in which 25% of respondents stated they would object strongly to working around gay people, and another 27% stated they would prefer not to do so).

[62] Stein, *Afterword*, *supra*, at 127.

[63] *See* Richard Posner, *Sex and Reason* 346 (1992) ("[H]omosexuals—who, like Jews, are despised more for what they are than for what they do—were frequently bracketed [with Jews] in medieval persecutions."); John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980). Thousands of gay people were exterminated along with Jews and Gypsies in Nazi concentration camps. *See, e.g.*, Heinz Heger, *The Men with the Pink Triangle* (David Fernbach trans., 1980).

[64] History Professor George A. Chauncey, Jr. of the University of Chicago testified at trial as to the history of discrimination against lesbians and gay men in America, beginning in colonial

been the object of some of the deepest prejudice and hatred in American society." [65]

In the early and mid-twentieth century, the mental health professions' adherence to the "illness model" of homosexual orientation—developed at least partly in an effort to displace the depravity/immorality model [66]—probably encouraged the development of bizarre, inhumane, and sometimes brutal "treatments" and "aversion therapies" for homosexual orientation.[67] In the 1940s and 1950s, gay people were often viewed and sometimes targeted as "sexual psychopaths." [68] And, until 1990, gay people were frequently excluded from the United States under an immigration statute denying

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times. *See* Pet. App. C-17; Trial Tr. at 178-239; *see also, e.g.*, George A. Chauncey, Jr., *Gay New York: Gender, Urban Culture and the Making of the Gay Male World, 1890-1940* (1994); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983); Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (1976).

[65] Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 934 (1989); *see* Posner, *supra*, at 291 ("In the United States . . . , not only is there a strong residue of hostility to homosexuals, but they labor under a series of legal disabilities.").

[66] *See* Berube, *supra*, at 136-37; Gonsiorek, *Empirical Basis, supra*, in *Homosexuality, supra*, at 116 ("homosexuality first evolved into a medical 'illness' in the late 19th or early 20th century depending on the country"); Stein, *Overview, supra*, at 14-15.

[67] *See* Haldeman, *Sexual Orientation Conversion Therapy, supra*, in *Homosexuality, supra*, at 152; Charles Silverstein, *Psychological and Medical Treatments of Homosexuality*, in *Homosexuality, supra*, at 106-11.

[68] *See* Berube, *supra*, at 258-59; *cf.* Samuel Brakel, John Parry & Barbara Weiner, *The Mentally Disabled and the Law* 739-43 (3d ed. 1985).

entry to persons "afflicted with psychopathic personality, or sexual deviation." [69]

Intense prejudice against lesbians and gay men remains prevalent in contemporary American society. Public opinion studies of attitudes towards lesbians and gay men indicate that, among large segments of the public, gay people are the subject of strong antipathy.[70] Verbal abuse is common.[71] Discrimination against gay people in such critical areas as employment and housing remains lawful in most jurisdictions, and appears to be widespread.[72]

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[69] 8 U.S.C. § 1182(a)(4) (1988); *see Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 122 (1967).

[70] In a representative nationwide survey of Americans conducted in late 1991 and early 1992, 59.9% of the respondents agreed with the statement, "I think lesbians are disgusting," and roughly the same percentage agreed when the question was asked regarding gay males. *See* Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psychol. Bull. (forthcoming 1995); Mary E. Kite, *When Perceptions Meet Reality: Individual Differences in Reactions to Lesbians and Gay Men*, in *Lesbian and Gay Psychology: Theory, Research, and Clinical Applications* 25-53 (Beverly Greene & Gregory M. Herek eds., 1994) [hereinafter *Lesbian and Gay Psychology*].

[71] *See* Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 20 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter *Hate Crimes*] (across 24 separate studies, an average of 80% of lesbian, gay, and bisexual respondents reported having been verbally harassed about their sexual orientation).

[72] A survey published by the National Gay and Lesbian Task Force Policy Institute of 20 employment discrimination studies conducted between 1980 and 1991 found that between 16% and 44% of lesbians and gay men had experienced employment discrimination. The survey's authors noted that discrimination also was common in such other areas as housing, public accommodations, and health care, and that fear of discrimination forces many gay men and lesbians to remain "closeted." M.V. Lee Badgett, Colleen Donnelly & Jennifer Kibbe, *Pervasive Patterns of Discrimination against Lesbians and Gay Men: Evidence from Surveys Across the*

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High rates of specifically anti-gay violence or "hate crimes" have been consistently documented.[73]

B. The Nature Of Anti-Gay Prejudice.

Most heterosexuals' negative attitudes toward lesbians and gay men are not based on personal experience with gay people. Only one in three Americans has a friend, relative, or acquaintance who is known by them to be lesbian or gay. Anti-gay attitudes have been found to be significantly less common among that one-third of the population.[74] Several studies indicate that correction of

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United States (1992) (on file with the American Psychological Association); *see also* Martin P. Levine, *Employment Discrimination Against Gay Men*, 9 Int'l Rev. Mod. Soc. 151 (1979); Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Work Force*, 9 Signs: J. Women Culture & Soc. 700 (1984).

[73] *See, e.g.*, Berrill, *supra*, in *Hate Crimes, supra*, at 20 (across 24 separate studies, an average of 44% of lesbian, gay, and bisexual respondents reported having been threatened with violence because of their sexual orientation); Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 Am. Psychologist 948, 949 (1989) (because of stigma, gay people under-report bias crimes motivated by anti-gay prejudice). *See generally Hate Crimes, supra*; Gary David Comstock, *Violence Against Lesbians and Gay Men* (1991); Special Issue, *Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy*, 5 J. Interpersonal Violence 267-543 (1990).

[74] *See* Herek & Capitanio, *"Some of My Best Friends", supra*; Gregory M. Herek & John P. Capitanio, *Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States*, 32 J. Sex Res. 95 (1995); Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. Sex Res. 239 (1993); Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. Homosexuality 1, 6 (1984) (summarizing research). Dislike toward gay and lesbian people tends to be higher among people who believe that homosexual orientation is learned or chosen. *See* William Schneider & I.A. Lewis, *The Straight Story on Homosexuality and Gay Rights*, Pub. Opinion, Feb.-Mar. 1984, at 16-20, 59-60; Joseph E. Aguero, Laura Bloch & Donn Byrne, *The Relationships Among*

inaccurate assumptions about lesbians and gay men often leads to a reduction in antipathy.[75]

Likewise, research has shown that many people base their opinions about gay people on an entrenched set of negative assumptions. Both gay men and lesbians are often associated with cross-sex characteristics. "Additionally, significant numbers of individuals characterize male homosexuals as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men." [76]

These images represent crude stereotypes. For example, although gay men have been stigmatized with the allegation that they are disproportionately responsible for child sexual abuse,[77] there is no evidence of any positive correlation between homosexual orientation and child moles-

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Sexual Beliefs, Attitudes, Experience, and Homophobia, 10 J. Homosexuality 95, 102 (1984).

[75] *See* Herek, *Beyond "Homophobia", supra*, at 6. At trial, Dr. Judd Marmor, the former president of the American Psychiatric Association, summarized the relationship between ignorance and prejudice: "prejudice is [being] down on something you're not up on." Trial Tr. at 388.

[76] Herek, *Beyond "Homophobia", supra*, at 9; *see also* Kite, *supra*, in *Lesbian and Gay Psychology, supra*, at 25-53; Emery S. Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 27 (1987) (describing variety of social ills falsely attributed to gay men and lesbians by publicists, including high crime rates, low SAT scores, and anorexia) (citations omitted).

[77] *See, e.g.*, Trial Tr. at 681-82 (testimony of Dr. Carole Jenny) (describing the campaign for Amendment 2); *id.* at 1052 (cross-examination of Kevin Tebedo, a leader of Colorado for Family Values ("CFV"), the organization that spearheaded the campaign for Amendment 2) (asserting—on the basis of an unnamed psychological report—that homosexuals are 11 times more likely to molest children than heterosexuals); *id.* at 109 (describing CFV campaign materials).

tation.[78] Similarly, despite stereotypes to the contrary, gay men and lesbians often form committed relationships that share principal elements of heterosexual marital relationships,[79] that are based on deep emotional attachments,[80] and that endure for decades.[81]

C. Effects Of Prejudice And Discrimination.

When prejudice against lesbians and gay men takes the form of violence or discrimination, it can have such

[78] *See* Kurt Freund, Robin Watson & Douglas Rienzo, *Heterosexuality, Homosexuality, and Erotic Age Preference*, 26 J. Sex. Res. 107, 115 (1989); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 Archives Sexual Behav. 175, 180-81 (1978); Carole Jenny, Thomas A. Roesler & Kimberly L. Poyer, *Are Children At Risk for Sexual Abuse by Homosexuals?*, 94 Pediatrics 41 (1994).

[79] *See* Lawrence A. Kurdek, *The Nature and Correlates of Relationship Quality in Gay, Lesbian and Heterosexual Cohabiting Couples: A Test of the Individual Difference, Interdependence, and Discrepancy Models*, in *Lesbian and Gay Psychology, supra*, at 133-55; David Parr McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* (1984); Letitia Anne Peplau & Hortensia Amaro, *Understanding Lesbian Relationships*, in *Homosexuality: Social, Psychological, and Biological Issues* 237-39 (William Paul, James D. Weinrich, John C. Gonsiorek & Mary E. Hotvedt eds., 1982) [hereinafter *Issues*]. Gay men and lesbians do not appear to differ from heterosexuals in their frequency of sexual intercourse. Researchers at the University of Chicago found "practically no difference between the rates of sex per month" for heterosexuals and for homosexuals and bisexuals: "The mean rates for [gay] men . . . are consistently, but not significantly, lower than the rates for [heterosexual] men. The rates for women hardly differ at all between the two groups." NORC Study, *supra*, at 317.

[80] *See* Letitia Anne Peplau, *Lesbian and Gay Relationships*, in *Homosexuality, supra*, at 179-83; Letitia Anne Peplau, *Research on Homosexual Couples: An Overview*, 8 J. Homosexuality 3, 5 (1982); Paul C. Larson, *Gay Male Relationships*, in *Issues, supra*, at 233-47.

[81] *See, e.g.*, McWhirter & Mattison, *supra*, at 285-86; Peplau, *Research on Homosexual Couples, supra*, at 5; Charles Silverstein, *Man to Man: Gay Couples in America* (1981).

tangible consequences as physical injury or lost employment. The harmful effects of prejudice, discrimination, and violence, however, are not limited to such bodily or pecuniary consequences. *Amici*'s members have long experience with the adverse psychological effects suffered by people who have an immediate and personal confrontation with anti-gay prejudice—whether in the form of verbal harassment from strangers, derision from family or coworkers, physical threats, or violent attack. The effects can include depression, a persistent sense of vulnerability, and efforts to rationalize the experience by viewing one's victimization as just punishment.[82] Gay people, like members of other groups that are subject to social prejudice, also frequently come to internalize society's negative stereotypes. Psychologists, psychiatrists, and social workers are particularly concerned about the harms that internalized social stigma can produce in gay adolescents who are newly becoming aware of their sexual orientation.[83]

[82] *See* Linda D. Garnets, Gregory M. Herek & Barrie Levy, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 366 (1990), *reprinted in Psychological Perspectives, supra*, at 583; Herek, *Stigma, Prejudice, and Violence, supra*, in *Homosexuality, supra*, at 73-75; Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995); *cf.* Morton Bard & Dawn Sangrey, *The Crime Victim's Book* (1986).

[83] *See, e.g.*, Gary Remafedi, James A. Farrow & Robert W. Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 Pediatrics 869 (1991); John C. Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents*, 9 J. Adolescent Health Care 114 (1988); Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youths*, 31 Developmental Psychol. 65 (1995); Mary Jane Rotheram-Borus, Margaret Rosario, Ronan Van Rossem, Helen Reid & Roy Gillis, *Prevalence, Course, and Predictors of Multiple Problem Behaviors Among Gay and Bisexual Male Adolescents*, 31 Developmental Psychol. 75 (1995); *see also Gay and Lesbian Youth* (Gilbert Herdt ed., 1989); Gilbert Herdt & Andrew Boxer, *Children of Horizons: How Gay and Lesbian Teens Are Leading a New Way Out of the Closet* (1993).

The stigma and ill treatment that attach merely to acknowledging homosexual orientation lead many gay people to remain "in the closet." [84] Concealing one's sexual orientation, or attempting to avoid association with other gay people, commonly tends to compound psychological distress. As explained in one recent review of the research literature,

> [p]sychological adjustment appears to be highest among men and women who are committed to their gay identity and do not attempt to hide their homosexuality from others. As with other stigmatized minorities, gay men and lesbians probably maintain self-esteem most effectively when they identify with and are integrated into the larger gay community. Conversely, people with a homosexual orientation who have not yet come out, who feel compelled to suppress their homoerotic urges, who wish that they could become heterosexual, or who are isolated from the gay community may experience significant psychological distress, including impairment of self-esteem. Chronically hiding one's sexual orientation can create a painful discrepancy between public and private identities, feelings of inauthenticity, and social isolation.[85]

The "daily need to hide an important aspect of . . . personal and social identity" operates as a "corrosive denial[] of self-respect and self-worth." [86] For some, social stigma

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[84] *See* Bell & Weinberg, *supra*, at 62-68.

[85] Garnets *et al.*, *supra*, *reprinted in Psychological Perspectives*, *supra*, at 582-83 (citations omitted); *see also id.* at 593 n.2 (noting danger of blackmail); *United States v. Lallemand*, 989 F.2d 936, 940 (7th Cir. 1993) (Posner, J.) (same).

[86] Hetrick & Martin, *supra*, at 28; *see also* A. Damien Martin, *Learning to Hide: The Socialization of the Gay Adolescent*, 10 *Adolescent Psychiatry: Developmental & Clinical Studies* 52, 58 (Sherman C. Feinstein, John G. Looney, Allan Z. Schwartzberg & Arthur D. Sorosky eds., 1982); Alan K. Malyon, *The Homosexual Adolescent: Developmental Issues and Social Bias*, 60 J. Child Welfare 321, 327 (1981).

turns into feelings of personal inferiority or self-hatred.[87] Government measures that foster such stigma, as by pointedly foreclosing opportunities for political participation for gay people, only exacerbate those psychological harms.[88]

CONCLUSION

To the extent that Amendment 2 rests on baseless stereotypes about gay people, and reflects the sort of historically rooted antipathy still common in our society, it threatens to compound the serious problems gay people face as a result of irrational discrimination, and the decision of the Colorado Supreme Court should be affirmed.

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[87] *See, e.g.*, Gonsiorek, *Mental Health Issues*, *supra*; John C. Gonsiorek & James R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, in *Homosexuality*, *supra*, at 161, 166.

[88] *Cf.* Glenda M. Russell, *The Psychological Effects of Amendment 2 on Lesbians, Gays and Bisexuals in Colorado* (forthcoming 1995) (on file with the American Psychological Association); Tr. of Prelim. Inj. Hr'g, Jan. 12, 1993, at 27-29, 32-34 (testimony of respondent John C. Miller); Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. Times, Nov. 8, 1992, at 38.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. THE EVOLUTION OF EQUAL PROTECTION ANALYSIS REFLECTS THIS COURT'S CONCERN THAT DISFAVORED GROUPS NOT BE HARMED BY LAWS ARISING FROM INVIDIOUS MOTIVATION	5
A. This Court's invention of "tiers" was not a product of some independent desire for a stratified system, but rather a concern that, while it was important to give latitude to the elected branches of government, deference should not be extended to invidiously motivated laws	6
B. Invidiously motivated laws are evaluated more skeptically, regardless of the "tier" to which the case is assigned	10
II. DIFFERENT GROUPS IN CONTEMPORARY SOCIETY ENCOUNTER INVIDIOUS DISCRIMINATION IN DIFFERENT WAYS, AND THIS COURT MUST BE SENSITIVE TO THESE DIFFERENCES IN ASCERTAINING WHETHER LEGISLATION VIOLATES THE EQUAL PROTECTION CLAUSE	16
A. Neither Respondents nor people with disabilities are merely an "identifiable group"	16
B. Groups which experience substantial invidious discrimination, but which have not been designated as "suspect," are in particular need of judicial protection from irrational laws	17

TABLE OF CONTENTS—Continued

Page

III. THE COURT SHOULD BE PARTICULARLY SKEPTICAL OF INVIDIOUSLY MOTIVATED DISCRIMINATORY LAWS WHICH ATTEMPT TO PREVENT ENACTMENT OF LEGISLATION ADDRESSING THE DISCRIMINATION ITSELF 20

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES Page

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 9
Brown v. Board of Education, 347 U.S. 483 (1954) .. 6
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ..... *passim*
City of Edmonds v. Oxford House, 115 S. Ct. 1776 (1995) 19
Craig v. Boren, 429 U.S. 190 (1976) 8, 14, 18
Dandridge v. Williams, 397 U.S. 471 (1970) 8
Davis v. Bandemer, 478 U.S. 109 (1986) 16
Equality Foundation of Greater Cincinnati v. City of Cincinnati, 94-3855/3973, 1995 WL 276248 (6th Cir., May 12, 1995) 12
FCC v. Beach Communications, 113 S. Ct. 2096 (1993) 7, 12
Florence County School District Four v. Carter, 114 S. Ct. 361 (1993) 19
Frontiero v. Richardson, 411 U.S. 677 (1973) 10
Graham v. Richardson, 402 U.S. 365 (1971) 8
Heller v. Doe, 113 S. Ct. 2637 (1993) 1, 11, 12, 13
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 10
Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 19
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 6
Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) 6
Palmore v. Sidotti, 466 U.S. 429 (1984) 6, 14
Powers v. Ohio, 499 U.S. 400 (1991) 18
San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) 8
Sugarman v. Dougall, 413 U.S. 634 (1973) 9
U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 6, 13, 14, 15
U.S. v. Carolene Products, 304 U.S. 144 (1938) 7
Vance v. Bradley, 440 U.S. 93 (1979) 7
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 7, 11, 14, 17

TABLE OF AUTHORITIES—Continued

	Page
STATE CASES	
State ex rel. Beattie v. Board of Education, 172 N.W. 153 (Wis. 1919)	19
FEDERAL STATUTES	
Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990)	19
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1988)	19
STATE STATUTES	
1920 Miss. Laws 288, 294	19
MISCELLANEOUS	
Bransford, Stephen, *Gay Politics v. Colorado and America: The Inside Story of Amendment 2* (1994)	20
Cook, Timothy M., *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393 (1991)	19
Ellis, James W., *On the "Usefulness" of Suspect Classifications*, 3 Constitutional Commentary 375 (1986)	11
Lusky, Louis, *Footnote Redux: A Carolene Products Reminiscence*, 82 Columbia L. Rev. 1093 (1982)	9
MacKinnon, Catherine A., *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991)	18
Powell, Jr., Lewis F., *Carolene Products Revisited*, 82 Columbia L. Rev. 1087 (1982)	11
Senate Regulatory Reform Group Targets 10 Worst Laws, National Journal's Congress Daily, January 26, 1995	20
Shapiro, Joseph P., *No Pity: People with Disabilities Forging a New Civil Rights Movement* (1993)	19
Statement of Rep. Philip M. Crane, February 14, 1995, 141 Cong. Rec., No. 29, E338-39 ("The Americans with Disabilities Act")	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1039

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ARC, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY, AND THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Amici are national organizations concerned with the interests of citizens who have disabilities. *Amici* have participated in numerous cases before this Court, most relevantly *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Heller v. Doe*, 113 S. Ct. 2637

(1993). *Amici* are concerned about the shaping of this Court's equal protection doctrine for cases involving groups that have not been recognized as "suspect," but where the challenged laws are the product of invidiously discriminatory motivation.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals working in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes, and treatment of mental disabilities.

THE ARC (formerly the Association for Retarded Citizens of the United States) is an association of parents, family members, professionals, and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS (NAPAS), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy agencies (P & As). P & As are mandated under the Development Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*) and related statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1994 alone, P & As served well over 600,000 individuals through a variety of mechanisms: individual case representation, information and referral services, and education efforts. NAPAS provides P & As with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government.

THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY (NARPA) is a national organization which addresses both mental health and mental retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and mental retardation services.

THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES (ANCOR) represents more than 660 agencies nationwide that together support more than 50,000 people with mental retardation and other disabilities. Most of our members operate community residences and support people in their own homes. About 85 percent of ANCOR members are nonprofit agencies. The remainder are proprietary agencies or are unincorporated family care homes. Cleburne Living Center is a member of ANCOR.

SUMMARY OF ARGUMENT

Amici recognize that the grant of certiorari in this case does not address the issue of whether Respondents are entitled to designation as a "suspect" or "semi-suspect" class. But the focus of Petitioners' argument on the scope of "independently identifiable groups," Pet. Br. at 34-38, raises the question of what characteristic of Respondents might entitle them to careful evaluation of the rationality or irrationality of the Colorado constitutional amendment.

A close reading of this Court's opinions implementing the test of rationality reveals substantially greater skepticism in cases of discriminatory laws that are the product of invidious motivation. This skepticism is present—and warranted—regardless of the so-called tier at which the Court announces the case is to be considered. *Amici* reject the contention that there is a "fourth tier," or that there is more than one rational basis test. But this Court's deference under that test is not limitless when the challenger has demonstrated that the law was invidiously motivated. In that regard, we believe that a careful analy-

sis of the *Cleburne* case is central to a fair understanding of this Court's equal protection jurisprudence.

Amici's experience in confronting discrimination against people with mental disabilities has taught us that different groups experience different forms of invidious discrimination. We are particularly concerned that Petitioners' rigidly mechanical reading of this Court's use of "tiers" to explain its equal protection cases is a misreading of those decisions. This misreading renders the result in cases like *Cleburne* inexplicable. The tiers are a tool for distinguishing cases that call for deference from those meriting more careful analysis. Petitioners' conceptualization of the tiers as the entirety of equal protection law, rather than as a tool, would also mean that the protection of the equal protection clause will increasingly be reserved for those who need it least.

It is our experience that combating patterns of bias has also taken a different course for different groups. But in each instance, an important step has been the development of protective legislation to supplant constitutional litigation as the principal source of redress. The Colorado provision at issue in this case is not only invidiously motivated, but seeks to preclude the potential for evolution in public attitudes from producing legislative enactments prohibiting discrimination. Therefore, this Court should declare the Colorado provision unconstitutional, even without applying heightened scrutiny, because it violates equal protection under any test.

ARGUMENT

I. THE EVOLUTION OF EQUAL PROTECTION ANALYSIS REFLECTS THIS COURT'S CONCERN THAT DISFAVORED GROUPS NOT BE HARMED BY LAWS ARISING FROM INVIDIOUS MOTIVATION.

Petitioners demand that this Court afford Colorado's discriminatory provision the most sweeping deference because the case does not involve a "suspect" or "quasi-suspect" class. Pet. Br. at 16. This insistence on an unanalytical deference is supported by a mere recitation of the fact that Respondents are not among the groups officially recognized as suspect classes. *Id.* at 17. Remarkably, the only case cited in support of this claim to the most deferential treatment is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), a case in which the Court declined to recognize people with mental retardation as a semi-suspect class, but hardly a case that can be held up as a model of uninquisitive deference to state rationalizations for its discriminatory action.

Amici believe that it may be unnecessary for this Court to reach the issue addressed by the Colorado Supreme Court concerning the nature and scope of the fundamental right to participate equally in the political process. If a law is unconstitutional under the rational basis test, it becomes unnecessary for the Court to decide whether the case warranted heightened scrutiny. The Colorado constitutional amendment cannot survive rational basis scrutiny when the implementation of that test involves the kind of analysis employed in *Cleburne*. And *amici* believe that the factors that led to the invalidation of the Cleburne ordinance have equivalent counterparts in this case.

The central failing of Petitioners' analysis is that it reads this Court's cases as erecting a rigid and conceptually crude system of "tiers," with the assignment of a case to a particular tier being essentially outcome determinative. While the assignment of a case to a level of

review does have important analytical consequences, the equal protection cases are less simplistic and mechanical than Petitioners appear to believe.

Amici believe that the system of tiers is a tool involving shifting burdens and presumptions that the Court has found useful in implementing the Equal Protection Clause's prohibition on discriminatory state action. But the Court has never indicated that it intended the tiers to be a substitute for actual analysis of potentially invidious [1] laws. Petitioners have mistaken a device in aid of the Court's analysis for the analysis itself.

A. This Court's invention of "tiers" was not a product of some independent desire for a stratified system, but rather a concern that, while it was important to give latitude to the elected branches of government, deference should not be extended to invidiously motivated laws.

It has long been recognized that the central teaching of the Equal Protection clause is that our Constitution will not tolerate invidious discrimination by state actors. But since "most laws differentiate in some fashion between classes of persons," *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2331 (1992), this Court has formulated its equal protection doctrines to require judges, in most cases, to defer to the policy choices of the politically responsive branches of state and federal governments. Thus, noninvidious discrimination by government officials has been deemed consistent with the equal protection principle so long as it meets an undemanding test of rationality. The paradigm model of this deferential approach is *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The implementation of this deferential test has acted as a check against any tendency by judges to second-guess the correctness or wisdom of political judgments by elected officials, and thus it has left room for majoritarian processes to govern on the overwhelming majority of public issues, unimpeded by the judiciary.

[1] As used by *amici*, the term invidious refers to a law motivated principally by an intent to disadvantage or exclude a group of individuals, not because of a position they take but rather because of who they are. Invidious motivation may arise from irrational fear of the group, *see, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. at 448, from false stereotypes about group members and their appropriate role in society, *see, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982), the group's political unpopularity, *see, e.g., U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), a desire to keep the group separate from the rest of society, *see, e.g., Brown v. Board of Education*, 347 U.S. 483, 494 (1954), or from concerns derived from the anticipated effects of private prejudice against the group, impermissibly effectuated by the state, *see, e.g., Palmore v. Sidotti*, 466 U.S. 429, 433 (1984).

The obverse of this deferential approach applies when the law in question involves either central constitutional rights or employs classifications especially likely to reflect an invidious intent to disadvantage a group because of who they are. Deference to legislative judgments is not required or appropriate where there is "reason to infer antipathy." *FCC v. Beach Communications*, 113 S. Ct. 2096, 2101 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). In such circumstances, legislative enactments and the motivations behind them are scrutinized far more skeptically.

This dichotomy between occasions appropriate for deference and those circumstances requiring skepticism has been explained as analysis of equal protection claims on different "tiers." The conceptual source of this approach is traced to *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), and in particular to its reference to "discrete and insular minorities." The implementation of this doctrine began when racial classifications were held to merit "strict" scrutiny. At this level, the Court analyzed the state's true purpose, required the state to demonstrate a compelling governmental interest, and insisted that it show that no less drastic means could have been em-

ployed to accomplish that purpose. In subsequent cases, a few other groups who shared some of the characteristics of racial minorities were granted similar recognition, *see, e.g., Graham v. Richardson,* 402 U.S. 365 (1971), while advocates for other groups had their claims rejected, *see, e.g., Dandridge v. Williams,* 397 U.S. 471 (1970).

The system of tiers became somewhat more complicated when the Court held that gender discrimination cases would be evaluated at a "middle" tier of "intermediate" or "heightened" scrutiny. *Craig v. Boren,* 429 U.S. 190 (1976). At this level, the real purposes of the legislature are analyzed to determine whether the law is "substantially related" to the achievement of "important governmental objectives." 429 U.S. at 197. While the Court has been less than comprehensive in detailing guidelines for implementing this test for "semi-suspect" groups, it seems clear that one feature it shares with strict scrutiny is a focus on real legislative purpose, as contrasted to hypothetical rationales which may have been concocted solely for the purpose of appearing "rational" to the adjudicators of the law's constitutionality.

Over the years, individual Justices have expressed varying degrees of ambivalence about the accuracy with which the tier system describes the actual process by which the Court evaluates equal protection cases. *See, e.g., San Antonio School Dist. v. Rodriquez,* 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) ("Court's decisions in the field of equal protection defy [the] easy categorization" of a two-tier system); *Cleburne,* 473 U.S. at 451 (Stevens, J., concurring) ("I have never been persuaded that these so called 'standards' adequately explain the decisional process."); *Craig v. Boren,* 429 U.S. at 210 (fn.) (Powell, J., concurring) (tiers are "viewed by many as a result-oriented substitute for more critical analysis"). Nonetheless, the Court's majority has continued to find the tier system a useful device for explaining its decisions, and for providing guidance to lower courts.

The Court has also resisted recognizing a proliferation of new suspect classes. Perhaps concerned that a mechanical application of the criteria of suspectness would require protection of numerous groups from the legislative process, *see, e.g., Sugarman v. Dougall,* 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting), the Court has not recognized additional "discrete and insular minorities" in the last two decades. Indeed, several of this Court's decisions can be read, in part, as admonitions to lower courts against the proliferation of new suspect classes. *See, e.g., Cleburne,* 473 U.S. at 442.[2]

But while resisting the recognition of additional groups entitled to recognition as suspect or semi-suspect, the Court's decisions have taken care to scrutinize with some care (albeit less than "heightened scrutiny") the rationality of another group of laws. These are cases involving legislation that appeared to be motivated by antipathy to groups disfavored because of social or political unpopularity or based on false stereotypes about the characteristics of the group's members.[3]

A principal example is *Cleburne.* In that case, frequently cited by Petitioners and their supporting *amici,* this Court addressed a law that arose from intentional,

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[2] This feature of *Cleburne* is particularly noticeable since the discussion of middle tier was unnecessary for the resolution of the dispute, given the fact that the Court had determined that the ordinance in question lacked a rational basis. *See generally Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501 (1985).

[3] Professor Lusky's definition of discrete and insular minorities might prove helpful in visualizing those groups—whether denominated as suspect classes or not—who may elicit invidiously motivated discrimination: "groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power." Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence,* 82 Columbia L. Rev. 1093, 1105 n.72 (1982). Such a definition would encompass both people with disabilities and Respondents.

invidious discrimination against a group that had not received "suspect" designation. We believe that a proper understanding of *Cleburne* is essential for the proper resolution of this case, and that this, in turn, requires more refined analysis of the role of invidious state motivation in this Court's equal protection jurisprudence.

B. Invidiously motivated laws are evaluated more skeptically, regardless of the "tier" to which the case is assigned.

From the beginning of modern equal protection doctrine, racial minorities have served as the paradigm model for evaluating whether other groups are entitled to solicitous judicial attention when they complain of unconstitutional discrimination. A number of the decisions over the last thirty years that have evaluated claims for "suspect" status have focused on the strengths and weaknesses of analogies to the status of racial minorities. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (plurality opinion); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

But in reality, what leads the Court to skepticism about a discriminatory law's constitutionality is not a mechanical gauging of the precision of the analogy between the disadvantaged group and racial minorities. Rather, the Court's cases reveal that laws are viewed more skeptically when they appear to be irrational or when they are insufficiently justified products of invidious discrimination. A careful reading of these cases indicates that the identification of a suspect (or quasi-suspect) class in a case leads the Court to shift away from the presumption of constitutionality, but the use (or lack) of that label is not outcome determinative in itself.

For example, in *Cleburne*, the Court declined to recognize people with mental retardation as a semi-suspect class, even though major elements of the analogy to racial minorities were striking. For example, people with mental

retardation have suffered a history of discriminatory and harmful treatment that five Justices described as "grotesque." 473 U.S. at 454 (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part). There was also ample evidence that vestiges of that history remained on the nation's statute books, such as the Cleburne ordinance itself. Mental retardation is an immutable characteristic, and thus there was no reason to fear extension of judicial protection to a group of citizens whose only defining characteristic was that they had "los[t] a legislative battle." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Columbia L. Rev. 1087, 1090 (1982). *Cf. Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Nonetheless, the Court declined to recognize people with mental retardation formally as a semi-suspect class for two related reasons. The first was that although members of the group itself were not able to seek political influence effectively, advocates on their behalf had obtained a number of favorable laws on several topics. Second, and perhaps more important, was the fact that the trait of mental retardation was not presumptively irrelevant to legitimate legislative goals. *See* James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 Constitutional Commentary 375 (1986). Taken together, these factors meant that the Court would not automatically presume (and direct lower courts invariably to presume) that any laws that treated people with mental retardation differently because of their mental limitations were *presumptively* unconstitutional.

But having declined to make such a categorical presumption, and while not "purport[ing] to apply a different standard" than the rational basis test, *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), the Court unanimously held the Cleburne ordinance to be a violation of the equal protection clause. It carefully sorted out the asserted rationales for the law, and identified some as insufficiently

connected to the ordinance's provisions, while concluding that others, which were deemed to be the real motives, were constitutionally impermissible. Part IV of the *Cleburne* decision is hardly a model of deference, as suggested by Petitioners and supporting *amici* in this case. *See also Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 94-3855/3973, 1995 WL 276248 at *6 (6th Cir. May 12, 1995). Rather, the Court carefully evaluated the law's rationality in light of the fact that there was ample "reason to infer antipathy." *FCC v. Beach Communications*, 113 S. Ct. at 2101. Both the majority and concurring opinions made clear that the law was evaluated under this standard and was found to be constitutionally inadequate.

Although the result in *Heller*, 113 S. Ct. 2637, was unfavorable to people with mental retardation, the Court's methodology was not markedly different. The statute in *Heller*, treated people with mental retardation and people with mental illness differently. It was evaluated under the rational basis test because a claim for heightened scrutiny based on the fundamental right to be free from physical confinement had not been argued in the courts below. 113 S. Ct. at 2642. Nonetheless, the level of deference involved in the evaluation of the law was certainly finite. Both the majority and dissenting opinions inquired with some care whether there was "some footing in the realities of the subject addressed by the legislation." 113 S. Ct. at 2643. Justice Kennedy's majority opinion, citing to numerous clinical authorities and studies, concluded that Kentucky had sufficiently rational reasons for treating the two groups differently. Justice Souter's dissenting opinion, also explicitly utilizing the rational basis test of *Cleburne*, and also upon careful consideration of the clinical and scientific literature, concluded that the state's justification for denying to people with mental retardation the rights afforded to people with mental illnesses was not sufficiently reasonable. *See, e.g.*, 113 S. Ct. at 2652-56. Although the state in *Heller* was not required to demonstrate that its discriminatory effect was substantially related to the achievement of an important governmental objective, neither did the Court indicate a willingness to accept just any rationalization for the different treatment of the two groups.

Amici disagree with the result in *Heller*, and also believe that the Kentucky statute would not have survived heightened scrutiny had the predicate for the appropriate standard been established in the court below. It is clear, however, that the majority concluded that even if the Kentucky legislature was mistaken about some of its factual premises (e.g. the prevalence of involuntary medication in mental retardation institutions), and even if the legislature indulged in some unfortunate stereotyping about people with mental retardation and their families, it did not act out of invidious motivation toward the group it was disadvantaging. *Amici* do not disagree with this reading of the case. We believe that the correct and most reasonable explanation for the difference between the *Cleburne* and *Heller* results was the absence of invidious motivation in the latter case.

A similar concern about invidious motivation can be found in other cases in which the Court has struck down laws under the test of rationality. For example, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, the Court did not appear to have given serious consideration to declaring "hippies" a suspect class, but nonetheless struck down the discriminatory law. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional *desire to harm a politically unpopular group* cannot constitute" a sufficient governmental interest. 413 U.S. at 534 (emphasis added).[4]

[4] A similar analysis of cases in which the rational basis test was employed more deferentially reveals none in which the Court was offered persuasive reason to infer antipathy against the disadvantaged group in the enactment of the challenged law.

Some have speculated that the Court has fashioned a fourth tier between *Craig* and *Lee Optical*, or that the rational basis test itself is somehow evolving. *Amici* find no support for either interpretation in the text of the Court's opinions. Rather, it seems clear that the Court is saying two important things. First, the existence of some invidiously discriminatory legislation directed at a particular group, coexisting with other, rational, legislation, will not be enough to require that all laws using the classification be presumed to be unconstitutional. In that way, legislators retain "the latitude necessary both to pursue policies designed [to benefit the group], and to freely and efficiently engage in activities that burden [the group] in what is essentially an incidental manner." *Cleburne*, 473 U.S. at 446. But the Court's decisions also teach that the ordinarily deferential posture of the test of rationality does not constitute a blank check for invidiously discriminatory laws based on archaic and false stereotypes or masking a true motivation "to harm a politically unpopular group." *Cleburne*, 473 U.S. at 447 (quoting *Moreno*). Nor will this test permit a law to give direct or indirect effect to private biases against the group. *Cleburne*, 473 U.S. at 448 (citing *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984)).

Whether a group is designated as suspect or not is not the essence of this Court's equal protection review, but rather is only a useful tool in its implementation. At the heart of the inquiry is whether a law is sufficiently closely tied to legitimate governmental purposes. The function of the "suspect" or "semi-suspect" label is principally to shift the Court's focus away from the ordinary presumption of constitutionality. That, of course, is no small matter. But even when that presumption is not shifted through the identification of "suspectness," it will be overcome if the challenger demonstrates facts indicating that a particular law was impermissibly motivated or insufficiently connected to legitimate governmental ends. A law which lacks a legitimate purpose or an adequate nexus to such

a purpose overcomes the presumption of constitutionality even without the designation of overall "suspectness." [5]

While *amici* continue to believe that the *Cleburne* decision was mistaken in declining to recognize people with mental retardation as a semi-suspect class, we consider the Court's overall approach sensible. First, it recognizes that some forms of discrimination, notably racial and gender bias, are so likely to be invidious and irrational that the equal protection clause should be read to erect a strong presumption of unconstitutionality. Second, it avoids creating an unreasonably large number of categories of presumptively unconstitutional laws by avoiding a proliferation of "suspect" groups. But it also recognizes that irrational and invidiously motivated laws are not limited to those that are visited upon the handful of groups that the Court has chosen to recognize as suspect. While the laws in this final category will not be presumed at the outset to be violations of the Constitution, neither will they receive an automatic "pass" from a Court whose blind adherence to a formulaic approach requires it to ignore their true motivation.

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[5] Part of the confusion about this Court's implementation of the system of tiers may result from the simple fact that laws that invidiously discriminate against groups that are not "suspect" or "semi-suspect" are relatively rare. This may be why cases like *Moreno* and *Cleburne* have seemed abberational to some. But while invidious laws are much more likely to be directed against groups that have suffered a history of pervasive discrimination, are politically disenfranchised, etc., the match between this Court's criteria for overall "footnote four" recognition and the existence of such laws is imperfect. *Moreno*, *Cleburne*, and the case at bar are clear examples of laws that invidiously discriminate against groups that have not been deemed to require recognition as suspect across the board.

II. DIFFERENT GROUPS IN CONTEMPORARY SOCIETY ENCOUNTER INVIDIOUS DISCRIMINATION IN DIFFERENT WAYS, AND THIS COURT MUST BE SENSITIVE TO THESE DIFFERENCES IN ASCERTAINING WHETHER LEGISLATION VIOLATES THE EQUAL PROTECTION CLAUSE.

Although invidious discrimination against any disfavored group can produce legislation that is irrational or laws that are insufficiently connected to an important governmental interest, different groups clearly experience discrimination in different ways. As this Court's decisions reveal, these differences are an essential, if sometimes unspoken, part of the equal protection calculus, regardless of the "tier" of analysis that has been announced.

A. Neither Respondents nor people with disabilities are merely an "identifiable group."

Petitioners have devoted considerable attention to the scope of the Colorado Supreme Court's ruling. In particular, they express a concern that extending protection to any "independently identifiable group" would limit the states' ability to regulate "a boy scout troop" or "a group of tax protestors." Pet. Br. at 34-35. *Amici* do not address the merits of the claim to a fundamental right in this case. Nonetheless, it is important to recognize that the groups encompassed in *amici's* reading of this Court's rational basis cases involving invidious discrimination are substantially narrower in scope than Petitioners envision. They are also more limited than the concept of "identifiable groups" potentially cognizable in unrelated contexts, such as legislative gerrymandering. *See, e.g., Davis v. Bandemer,* 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

It is essential to recognize that neither the people who wanted to live in the group home in *Cleburne* nor Respondents in this case are merely a self-identified interest group or political faction. Each is a group whose claim merits the careful attention of this Court because they

were singled out by the state for discriminatory treatment because of who they are, and not because of a political position they have taken or a club they have chosen to join. It is that "singling out" that renders the discrimination invidious, and thus wholly unlike the cases of factions whose identity derives principally from the fact that they were losers in a political dispute. *Cf. Williamson v. Lee Optical,* 348 U.S. 483 (1955).

B. Groups which experience substantial invidious discrimination, but which have not been designated as "suspect," are in particular need of judicial protection from irrational laws.

One unintended consequence of the Court's reluctance to recognize suspect groups, if it were implemented in a rigidified and inflexible fashion, is that with the passage of time the Court's heightened scrutiny of invidious legislation would be reserved for those groups who will need it least. This paradoxical situation could result from the fact that the recognition of groups which have long been acknowledged as suspect occurred at a time when an abundance of legislation singled them out for unfavorable treatment. But over the course of time and with the evolution of public attitudes and tolerance, invidious laws directed against those groups are now enacted much less frequently.

For example, prejudice against racial minorities remains a critical national concern, and the persistent, enduring effects of previous official discrimination are central to our understanding of that problem. But official state actions consciously intended to harm or disadvantage members of those minorities are now encountered far less frequently than they were 40 or 50 years ago when this Court began subjecting them to the presumption of unconstitutionality. The dynamic of how these changes took place is both familiar and complex. Many of the laws simply fell to constitutional challenges. But those judicial decisions also contributed to changes in

public attitudes that allowed the political system to develop its own antidotes to open, public bigotry. In this way, the Court's decisions helped make room for legislative protection of minorities, and laws barring public and private acts of racial discrimination are now nearly ubiquitous. The relatively infrequent cases of direct racial discrimination by the state that are litigated under the Constitution continue to merit and receive this Court's strictest scrutiny. *See, e.g., Powers v. Ohio,* 499 U.S. 400 (1991). But today, the vast majority of cases alleging racial bias are adjudicated within the statutory framework, requiring far fewer constitutional interpretations from the judiciary.

It has been observed that while all prejudice has common roots and features, in combating such bias each group confronts a somewhat different legal template.[6] For example, the sustained effort in this Court to allow women to realize the promise of the equal protection clause began two or three decades after its racial counterpart. And while *de facto* bias and prejudice may have eroded no less slowly than was true for racial minorities, statutory protections were enacted earlier in the process. (This difference may have been a product of the existence of models of civil rights legislation already enacted for racial minorities, and may also have benefitted from the fact that women constitute a majority of the electorate.) But despite such differences, the result is similar: the vast majority of gender discrimination cases today are litigated under statutory protections rather than requiring numerous interpretations of the *Craig* test.

The template for people with disabilities is different from either race or gender. The official discrimination and maltreatment of people with disabilities suffered was aptly described as "grotesque," *Cleburne,* 473 U.S. at 454

[6] Catherine A. MacKinnon, *Reflections on Sex Equality Under Law,* 100 Yale L.J. 1281, 1299 (1991).

(Stevens, J. concurring).[7] Recognition of the unacceptability of this kind of discrimination has come slowly,[8] but some legislative protections, albeit imperfect and incomplete, have been enacted. *See, e.g.,* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1988). Today, disputes over entitlement to public education are far more likely to be resolved under statutes than as constitutional claims. *Compare Mills v. Board of Education of District of Columbia,* 348 F.Supp. 866 (D.D.C. 1972), *with Florence County School District Four v. Carter,* 114 S. Ct. 361 (1993). And attempts by communities to exclude citizens with disabilities, which once would have produced constitutional challenges, are now more likely to be litigated as statutory as well. *Compare City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), *with City of Edmonds v. Oxford House,* 115 S. Ct. 1776 (1995).

For people with disabilities, constitutional protection against discrimination by governmental actors remains crucial even in light of these legislative developments, because the scope of the statutory protections is incomplete. The equal protection doctrine that applies to people with disabilities is also important because, unlike racial

[7] *See, e.g., State ex rel. Beattie v. Board of Education,* 172 N.W. 153, 154 (Wis. 1919) (child with a disability could be excluded from school because he "produces a depressing and nauseating effect upon the teachers and school children"); 1920 Miss. Laws 288, 294 (chancery courts given jurisdiction over individuals in "the higher grades and varieties of mental inferiority which renders the subjects unfit for citizenship"). A fuller sampling of such discriminatory statutes is set forth in the *Amicus Curiae* Brief of the American Association on Mental Deficiency, et al., in the *Cleburne* case, No. 84-468, at Appendix B. *See also* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration,* 64 Temple L. Rev. 393, 399-414 (1991) (citing numerous examples).

[8] *See generally* Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (1993).

and gender civil rights laws, the statutory protections for people with disabilities remain controversial and vulnerable to attack in the political arena.[9] Thus when a constitutional challenge is brought against a law that invidiously discriminates against people with mental retardation, it remains essential that the Court not defer to the kind of legislative motivation it uncovered and rejected in *Cleburne*.

III. THE COURT SHOULD BE PARTICULARLY SKEPTICAL OF INVIDIOUSLY MOTIVATED DISCRIMINATORY LAWS WHICH ATTEMPT TO PREVENT ENACTMENT OF LEGISLATION ADDRESSING THE DISCRIMINATION ITSELF.

While it is not part of the formal structure of rationality review, the case law seems to suggest that this Court is not unmindful of what it is that the invidiously discriminatory law attempts to do. Even when there was not a fundamental right involved, the nature of the discriminatory deprivation appears to be an informal part of the calculus, particularly when it is intertwined with, and illuminates, the invidious motivation itself. For example, it may not be totally irrelevant to the *Cleburne* analysis that the city was attempting to exclude citizens with mental retardation totally from living in the community.

In the case at bar, the challenged Colorado constitutional amendment discriminates against a group on the basis of blatantly invidious motivation.[10] But it also has

[9] *See, e.g.*, Statement of Rep. Philip M. Crane, February 14, 1995, 141 Congressional Record, No. 29, E338-39 ("The Americans with Disabilities Act"); *Senate Regulatory Reform Group Targets 10 Worst Laws*, National Journal's Congress Daily, January 26, 1995 (suggesting a need to restrict the definition of disability in the ADA).

[10] The tone of the rhetoric in the campaign that led to the enactment of the provision and the motivation behind it are revealed, e.g., in the proponents' own account of the dispute. *See* Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2* (1994).

the explicitly intended effect of preventing the consideration and development of legislatively enacted approaches to the problem of discrimination. Such an artificial short-circuiting of the political process, engendered by the proponents' fear that statutory protections may be enacted as public attitudes evolve, is precisely the kind of discriminatory law to which this Court should not blindly defer.

CONCLUSION

For the aforementioned reasons, *amici* urge affirmance of the judgment of the Colorado Supreme Court.

Respectfully submitted,

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June 19, 1995

No. [illegible]

In The

Supreme Court of the United States

October Term, 1994

Roy Romer, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, the Boulder Valley School District Re-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

---

BRIEF OF NATIONAL EDUCATION ASSOCIATION, THE COLORADO EDUCATION ASSOCIATION, THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL ASSOCIATION FOR CHICANA AND CHICANO STUDIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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31 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. THE PUBLIC SCHOOLS MUST, AS PART OF THEIR EDUCATIONAL MISSION, ADDRESS THE NEEDS OF GAY AND LESBIAN STUDENTS	8
II. AMENDMENT 2 UNDERMINES THE ABILITY OF THE PUBLIC SCHOOLS TO MEET THE NEEDS OF GAY AND LESBIAN STUDENTS AND TO TEACH ALL STUDENTS THE BROADER LESSON OF TOLERANCE	19
CONCLUSION	25

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1039

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

---

BRIEF OF NATIONAL EDUCATION ASSOCIATION, THE COLORADO EDUCATION ASSOCIATION, THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL ASSOCIATION FOR CHICANA AND CHICANO STUDIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed, with the written consent of the parties, in support of respondents Richard G.

Evans *et al.* by a coalition of organizations concerned with the quality of public education. *Amici* include the National Education Association, the Colorado Education Association, the American Federation of Teachers, AFL-CIO, the American Association of University Professors, the Association for Supervision and Curriculum Development, the Council of the Great City Schools, and the National Association for Chicana and Chicano Studies.

INTEREST OF AMICI CURIAE

The National Education Association ("NEA") is a nationwide employee organization with a current membership of some 2.2 million teachers and other education employees, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, and has approximately 12,000 local affiliates in individual school districts, colleges, and universities throughout the United States. As set forth in the preamble to its Constitution, the objectives of NEA are, *inter alia*, to "advance the cause of education for all individuals, promote the health and welfare of children and/or students . . . [and] promote and protect human and civil rights." The Colorado Education Association ("CEA") is NEA's state affiliate in Colorado, and it pursues similar objectives within the state of Colorado.

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union affiliated with the AFL-CIO, and is the parent organization of various state affiliates. AFT represents over 875,000 members who work in public elementary and secondary schools, community colleges and universities, state government, and health care. The vast majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools.

The American Association of University Professors ("AAUP") is a national membership organization of

more than 43,000 faculty members and research scholars in all the academic disciplines. Among other activities, AAUP formulates recommended policies for American higher education. Since 1976, AAUP has condemned discrimination in the academic community on the basis of sexual orientation. The organization seeks adoption of similar policies by colleges and universities. Complementing its policy work, AAUP participates as *amicus curiae* in litigation, and has participated in several cases involving gay and lesbian rights. AAUP is deeply concerned about the pervasive national problem of discrimination on the basis of sexual orientation, and believes this problem must be remedied at all levels of education.

The Association for Supervision and Curriculum Development ("ASCD") is an international nonpartisan association of over 198,000 educators who share the belief that all students can succeed in a challenging, well-planned educational program. ASCD is committed to its mission of forging covenants in teaching and learning for the success of all learners. ASCD condemns discrimination in any form and has adopted a resolution urging its members to work with other organizations to eliminate discrimination against students because of their sexual orientation.

The Council of the Great City Schools ("CGCS") is a coalition of some 50 of the nation's largest urban public school systems. Its members' inner-city schools serve about six million children (13.5 percent of the nation's total elementary and secondary school enrollment), 75 percent of them African American, Hispanic, and Asian American. Approximately 40 percent of the nation's poor children, 35 percent if its limited English proficient children, and 12 percent of its disabled children are enrolled in CGCS schools. One of the central missions of these schools is to create educational opportunities for youth whose background or status would otherwise doom them to a second-class future. That includes students no matter their gender or sexual orientation. A substantial part

of making those individual futures brighter involves instilling tolerance, respect, and acceptance. CGCS believes that this case is important to the nation's urban schools in ensuring that they remain free to develop prudent, age-sensitive education for all students, and in permitting each city to retain decision-making authority to match local wishes and values.

The National Association for Chicana and Chicano Studies ("NACCS"), with a membership of approximately 2,000, is the oldest and largest organization bringing together Chicana and Chicano academics, students, and community members from across the nation and across disciplinary lines. NACCS confronts and challenges structures of inequality based on race, class, gender, and sexuality. As an organization historically concerned with the quality of life of all Chicanas and Chicanos, NACCS asserts that discrimination against any members of the community is discrimination against all. As an academic community with firsthand experience of discrimination and prejudice in society and throughout education, NACCS strongly believes that academic development and freedom depend on a climate of mutual respect and acceptance of diversity.

Because *amici* are opposed to discrimination on the basis of sexual orientation, because *amici* believe that public school districts must be able to prohibit such discrimination and otherwise provide for the needs of gay and lesbian students if they are to fulfill their educational mission, and because *amici* share an institutional commitment to the educational mission of the public schools, *amici* have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the constitutionality of a proposed amendment to Article II of the Colorado Constitution that was approved by the electorate on November 3, 1992. This proposed amendment—known as "Amendment 2"—provides as follows:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Although *amici* are of the opinion that Amendment 2 violates the Fourteenth Amendment to the United States Constitution, it is not the purpose of this brief to present the relevant constitutional arguments. *Amici* defer in this regard to respondents. As organizations concerned with the quality of public education, *amici* file this brief in order to provide this Court with a perspective on the impact of Amendment 2 that it might not otherwise receive. Specifically, we shall demonstrate why Amendment 2 significantly would impair the ability of the public schools to fulfill their educational mission.[1]

No precise figures are available as to the number of gay and lesbian[2] students in the public schools. Based upon what is known about the incidence of homosexual-

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[1] As used in this brief, the term "public schools" refers to elementary and secondary schools. This is not to suggest, however, that the analysis necessarily is limited to this universe. With appropriate adjustments for the maturity level of the individuals involved, much of the analysis would apply as well to students in public colleges and universities.

[2] Amendment 2 refers to persons of "homosexual, lesbian or bisexual orientation." For purposes of simplicity in discussion, and to be consistent with the terminology used in much of the source material cited, we shall in this brief refer to the persons encompassed by Amendment 2 as "gay and lesbian."

ity in the general population,[3] however, it can be assumed that there are students in almost every classroom in the country who are gay or lesbian.

In Part I of our Argument, we explain why the public schools must display particular concern for this segment of the student population. While sexual orientation is generally established early in life, it is during adolescence that most gay and lesbian youngsters—like their heterosexual counterparts—become aware of their sexual orientation. Gay and lesbian adolescents develop this awareness in a societal context in which homosexuals are widely rejected on the basis of invidious stereotypes which the adolescent likely already has internalized. Unlike members of other minority groups, moreover, gay and lesbian adolescents do not have access to support groups; it generally is in isolation and ignorance that they wrestle with the discovery of their new-found status as members of a group despised by much of society.

Typically, the gay or lesbian adolescent attempts initially to deal with his or her sexual identity by hiding it, and leading a life based on deception and fear of discovery. Should the adolescent's sexual orientation be disclosed, voluntarily or involuntarily, he or she risks rejection and persecution, both at home and at school. Because of societal discrimination and internalized homophobia, many gay and lesbian adolescents suffer from low self-esteem, self-hatred, and isolation—of which one result is an extraordinarily high level of attempted suicide

[3] Estimates of the homosexual portion of the general population range between a high of 10 percent and a low of 4 percent for men and 1.5 percent for women. *See* Bailey & Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Arch. Gen. Psychiatry 1089, 1093 (1991); Bailey, Pillard, Neale & Agyei, *Heritable Factors Influence Sexual Orientation in Women*, 50 Arch. Gen. Psychiatry 217, 220 (1993). It is neither possible, nor for present purposes necessary, to resolve these differences. Under any reasonable estimate, it is clear that the number of gays and lesbians in the general population is significant.

among these young people. The public schools fail in their educational mission if they do not create a secure learning environment for gay and lesbian students, and develop programs to address the needs of these students.

In Part II of our Argument, we demonstrate why Amendment 2 undermines the ability of the public schools to meet the needs of gay and lesbian students, and, indeed, to fulfill the schools' broader obligation properly to educate all students, including those who are not themselves gay or lesbian. Amendment 2 would prohibit school districts from adopting the type of antidiscrimination policies that are essential for the creation of a secure learning environment for gay and lesbian students, and it would deter school districts from providing training for their employees and instituting other programs designed to meet the needs of these at-risk students. Further, the threat to job security that may result from voluntary or involuntary disclosure that a teacher or other staff member is gay or lesbian will discourage such employees from serving as much-needed counselors and role models for their gay and lesbian students. Finally, and in some ways most tragically, by granting constitutional sanction to invidious discrimination against the members of one minority group, Amendment 2 undermines the ability of the public schools to teach all of their students the lessons of tolerance and respect for those who are different.

ARGUMENT

I. THE PUBLIC SCHOOLS MUST, AS PART OF THEIR EDUCATIONAL MISSION, ADDRESS THE NEEDS OF GAY AND LESBIAN STUDENTS

A. It is not known with certainty why some people develop a homosexual and others a heterosexual orientation. While there probably is no single factor that determines a person's sexual orientation, there is little doubt that genetics plays a major role. Recent studies of identical twins suggest that the influence of genetic factors in determining sexual orientation is somewhere between 30 and 75 percent, in both men and women. Bailey & Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Arch. Gen. Psychiatry 1089 (1991); Bailey, Pillard, Neale & Agyei, *Heritable Factors Influence Sexual Orientation in Women*, 50 Arch. Gen. Psychiatry 217 (1993); *see also* Bailey & Benishay, *Familial Aggregation of Female Sexual Orientation*, 150 Am. J. Psychiatry 272 (1993). *See generally* Burr, *Homosexuality and Biology*, Atlantic Monthly, March 1993, at 47. In addition, there is evidence that sexual orientation derives to some degree from other biological factors, such as prenatal sex hormone levels. Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. Psychiatry & Law 537, 549 (1988).

Whatever influence environmental factors have on a person's sexual orientation, it is believed that this influence is felt early in the life of a child, and that sexual orientation becomes fixed before puberty, quite possibly by the age of five or six. Burr, *supra*, at 64; Sturdevant & Remafedi, *Special Health Needs of Homosexual Youth*, 3 Adolescent Medicine 359, 360 (1992); Hunter & Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 Social Work in Education 180, 181 (1987); Dennis & Harlow, *Gay Youth and the Right to Education*, 4 Yale L. & Policy Rev. 446, 465 (1986); Green, *supra*,

at 567-68. Many gays and lesbians recall being "different" from their peers during childhood, *e.g.*, by displaying atypical gender roles. M. Saghir & E. Robins, *Male and Female Homosexuality: A Comprehensive Investigation* 18-21, 192-94 (1973); A. Bell, M. Weinberg & S. Hammersmith, *Sexual Preference* 188-89 (1981). In most cases, gays and lesbians develop an awareness of their attraction to the same sex during early adolescence, often by the age of fourteen. Anderson, *Family and Peer Relations of Gay Adolescents, in* 14 *Adolescent Psychiatry: Development and Clinical Studies* 162, 165 (S. Feinstein ed. 1987); Remafedi, *Male Homosexuality: The Adolescent's Perspective*, 79 Pediatrics 326, 330 (1987); D'Augelli & Dark, *Lesbian, Gay, and Bisexual Youths, in Reason to Hope: A Psychosocial Perspective on Violence and Youth* 177, 180 (L. Eron, J. Gentry & P. Schlegel eds. 1995).

It is clear, therefore, that numerous public school students will be struggling during their junior and senior high school years to cope with the realization of their homosexual identity. And they will be doing so in the face of a society that is almost uniformly hostile to gays and lesbians. These students are at high risk for serious psychosocial problems—not because they are gay or lesbian, but because of the prejudice and rejection they encounter around them.

B. Long before the time that gay and lesbian youth become aware of their sexual orientation, most have internalized the invidious stereotypes which accompany the pervasive condemnatory attitudes that one of petitioners' *amici* describes as society's "expression of [its] consensus on matters of homosexuality." [4] Thus,

> [e]ven before they reach the kindergarten playground, they learn nasty words for homosexuals. The few

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[4] Brief Amicus Curiae of the Family Research Council in Support of Petitioners at 2 and *passim*.

> lesbian or gay people they have seen in movies and on television often die by suicide, homicide, or AIDS, creating disastrous expectations. Moreover, young people generally assume that all the people they know are heterosexual; they have no idea that some of the healthy, respected adults around them are lesbian or gay.

Cook, *Who is Killing Whom?* 1 (Respect All Youth Project of Fed'n of Parents & Friends of Lesbians & Gays, Issue Paper 1, 1991). Then, "[i]n adolescence, young homosexually oriented persons are faced with the growing awareness that they may be among the most despised." Martin, *Learning to Hide: The Socialization of the Gay Adolescent, in* 10 *Adolescent Psychiatry: Developmental and Clinical Studies* 52, 57 (S. Feinstein *et al.* eds. 1982).

The problem is particularly acute because gay and lesbian youth usually discover their sexual orientation in complete isolation; at the time of their greatest anxiety they typically have no access to support groups, and often are unaware that there are many others among their peers who are undergoing the same experience. Gay and lesbian youth differ in this regard from members of most other stigmatized minority groups:

> Most individuals within other stigmatized groups, such as African Americans, grow up in families whose members have personally experienced discrimination. Such families have developed ways to support each other and to teach children—virtually from infancy—how to cope. Lesbian and gay youth, on the other hand, usually have no such family and community backup; indeed, their families often mirror the larger society's hostility.

Cook, *supra*, at 2. While "Blacks, Jews, and Hispanics are not thrown out of their families or religions at adolescence for being black, Jewish, or Hispanic[,] homosexual adolescents are." Hetrick & Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 29 (1987).

In addition, gay and lesbian youth lack access to accurate information about homosexuality, and thus "often demonstrate an appalling ignorance of what it means to be homosexual, reflecting the basest stereotypes about homosexual people and therefore about themselvs." *Id.* at 32. This lack of accurate information about homosexuality is exacerbated by the absence of appropriate role models. Because of the societal stigma associated with homosexuality,

> [h]omosexually oriented teachers, clergymen, and physicians must hide their sexual identity. Aside from the effect on the professionals involved, this discrimination effectively denies suitable role models who can demonstrate to the gay adolescent by example, sharing, and teaching that the prejudices of society are false and that homosexuality does not automatically mean depravity, criminality, and degeneracy. Heterosexual adolescents have a multitude of role models for all possible social identities which may touch on their sexual orientation, but homosexual adolescents have no constructive models and indeed are led to believe that their sexual identity precludes other roles.

Martin, *supra*, at 55.[5]

The result is often an "internalized homophobia," Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents*, 9 J. Adolescent Health Care 114, 117-19 (1988), which brings with it a sense of social isolation and moral worthlessness, ranging from a tendency toward self-doubt to overt self-hatred:

> Homosexual teenagers, like heterosexual teenagers, are raised with antihomosexual biases. Among homo-

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[5] Gay and lesbian adults often hesitate to counsel and serve as role models for gay adolescents to avoid the accusation that they are "encouraging" homosexuality or "recruiting" adolescents to be homosexual. Taylor, *Gay and Lesbian Youth: Challenging the Policy of Denial, in Helping Gay and Lesbian Youth* 39, 46 (T. DeCrescenzo ed. 1994). *See infra* note 14.

> sexual adolescents, the effects of homophobia are complex. To some degree, homophobic attitudes are internalized and thereby contribute to negative self-image. Internalized homophobia has a variety of manifestations, including overtly self-destructive and abusive behaviors. More subtle symptoms include abandonment of educational goals and poorly planned disclosure of sexual orientation to others. Homosexual youth often need help to recognize and modify internalized homophobia before self-destructive behaviors cause irreparable harm.

Sturdevant & Remafedi, *supra*, at 363.[6] Not surprisingly, "[m]ost gay adolescents can vividly recall the intense anxiety they experienced when they first discovered that they suddenly belonged to this group of people that is so vehemently despised by most others. The industriousness they mastered in childhood, the positive self-regard they may have developed, and the dreams for a happy and productive future seem to be dashed almost as soon as they enter the awareness of the gay adolescent." Anderson, *supra*, at 173.

Because this homosexual identity is likely to have serious consequences for their family relationships, most gay and lesbian adolescents initially attempt to conceal their sexual orientation:

> Realizing that if one's parents knew the truth, they would find one utterly contemptible, is frightening to the adolescent. It is not surprising that most of these adolescents feared that they would be rejected, punished, perhaps physically assaulted, or expelled from

[6] One consequence of this internalized homophobia—and the lack of positive gay or lesbian role models—is that "[a]dolescents who accept the negative images attached to a homosexual identity are at risk for incorporating them within their own repertoire of behaviors. For example, they may assume the affectations or the promiscuous lifestyles that they believe are socially expected." Remafedi & Blum, *Working with Gay and Lesbian Adolescents*, 15 Pediatric Annals 773, 779 (1986).

> the family. The gay adolescent consciously and unconsciously defends against these fears by a variety of maneuvers that have in common an effect of distancing the child from the family.

Id. at 165. The same is true, perhaps to an even greater extent, in the adolescent's relationships with his or her peer group. "Withholding important personal information and suppression of his or her genuine interests results in the elaboration of a false persona in order to gain peer acceptance or to maintain status." Anderson, *Lesbian and Gay Adolescents: Social and Developmental Considerations, in The Gay Teen* 17, 24 (G. Unks ed. 1995).

This strategy of concealment "exacts a high cost in vigilance, self-loathing, and the elaboration of defenses to contain the chronic anxiety which this situation produces." *Id.* Such a strategy

> distorts almost all relationships the adolescent may attempt to develop or maintain and creates an increasing sense of isolation. The adolescent realizes that his or her membership in the approved group, whether it be the team, the church, the classroom, or the family, is based on a lie. This reinforces the belief that one is not truly a member of the group, even while membership within it is maintained.

Martin, *supra*, at 58-59.[7]

[7] Typical of the gay or lesbian adolescent's position is the following comment by a teenager who testified before the Massachusetts Governor's Commission on Gay and Lesbian Youth:

> I felt completely isolated from my family and friends. It appeared that I was the only one who ever had these queer feelings. I couldn't come out to anyone. After all, who would associate with anyone who was sick and deranged as I throught myself to be if they knew the truth. Not only does society shout at me that I am evil, but an inner voice whispers it as well.

Making Schools Safe for Gay and Lesbian Youth 14 (Massachusetts Governor's Commission on Gay and Lesbian Youth 1993).

If, on the other hand, gay and lesbian youth are open about their sexual orientation, "they may feel some sense of security within themselves but face tremendous external conflicts with family and peers." Gibson, *Gay Male and Lesbian Youth Suicide*, Report of the Secretary's Task Force on Youth Suicide 3-110, 3-112 (U.S. Dep't of Health & Human Services 1989). *See generally* Borhek, *Helping Gay and Lesbian Adolescents and Their Families*, 9 J. Adolescent Health Care 123 (1988). The inability of the adolescent's parents to reconcile their child's homosexual identity with their own attitudes and values frequently results in the child whose sexual orientation is (voluntarily or involuntarily) disclosed being forced to leave home.[8] One study of gay adolescents found that nearly half of the subjects had left their home at least once. Remafedi, *Adolescent Homosexuality: Psychosocial and Medical Implications*, 79 Pediatrics 331, 332 (1987). Most often, those who leave home do not do so of their own volition. They are rather "pushaways" or "throwaways," Gibson, *supra*, at 3-112, many of whom end up on the streets, frequently turning to prostitution and drugs.[9]

Nor are gay and lesbian adolescents likely to find a more understanding environment with their peers:

> Adolescents can be notoriously intolerant of personal differences, and openly homosexual teenagers confront every day the social stigma attached to their homosexuality. They may be the victims of taunts, insults, cruel jokes, and physical abuse, often without protection or role-modeling by responsible adults. If a young lesbian has no familiarity with successful lesbians nor any concept of a healthy lesbian lifestyle, then the social construct of abnormality or psychopathology will be her prevailing internal image.

Sturdevant & Remafedi, *supra*, at 361.

[8] In counseling gay and lesbian adolescents, Hetrick and Martin "strongly recommend to clients who are still in high school that they think very carefully before coming out to their parents. We have seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street." Hetrick & Martin, *supra*, at 35.

[9] By one estimate, as many as 25 percent of all young people living on the streets are gay, lesbian, bisexual, or transsexual. *Gibson, supra*, at 3-114.

As a result, gay and lesbian adolescents frequently experience low self-esteem, identity conflicts, social isolation, academic inhibition, truancy, substance abuse, depression, suicidal ideation, and alienation from family and peer groups. Anderson, *Family and Peer Relations, supra*, at 176. These psychosocial problems may be transient, *id.*, but that is not always the case: sometimes they are fatal. According to the Secretary of Health and Human Services' Task Force on Youth Suicide, suicide is the leading cause of death among gay and lesbian youth. Gibson, *supra*, at 3-110. Nor is that suprising, inasmuch as "self-hatred, low self-esteem, and intense feelings of aloneness are typical of the profile of a suicidal person." *Making Schools Safe for Gay and Lesbian Youth* 14 (Massachusetts Governor's Commission on Gay and Lesbian Youth 1993) (citing J. Maltsberger, *Suicide Risk: The Formulation of Clinical Judgment* (1986)). Indeed, gay and lesbian youth are two to three times more likely to attempt suicide than other young people, and actual suicides by this group constitute up to 30 percent of all youth suicides. Gibson, *supra*, at 3-110. One study of young gays found that 55 percent of the sample reported a history of suicidal ideation, while 20 percent actually had attempted suicide. Schneider, Farberow & Kruks, *Suicidal Behavior in Adolescent and Young Adult Gay Men*, 19 Suicide and Life-Threatening Behavior 381 (1989). It is particularly instructive that one-third of the gay and lesbian youth who attempt suicide make their first attempt in the same year in which they come to identify themselves as homosexual. Remafedi, Farrow & Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 Pediatrics 869,

873 (1991). *See generally Death by Denial: Studies of Suicide in Gay and Lesbian Teenagers* (G. Remafedi ed. 1994).[10]

C. Rather than helping gay and lesbian students to deal with their sexual identity, the public schools often are a large part of the problem such students face. As one commentator puts it, "[n]owhere are the[] harshly negative attitudes towards homosexuality more pronounced than in junior high and high school. These institutions are the brutal training grounds where traditional social roles are rigidly reinforced." Gibson, *supra*, at 3-117. Thus, "[h]igh school, a difficult time for most people, is often a nightmare for lesbian and gay youth." Abinati, *Legal Challenges Facing Lesbian and Gay Youth, in Helping Gay and Lesbian Youth* 149, 156 (T. DeCrescenzo ed. 1994).

For many gay and lesbian students, school means "ridicule from teachers, violent harassment from fellow students, and refusals from administrators to punish verbal and physical attacks upon them." Dennis & Harlow, *supra*, at 446. Forty-five percent of gays and nearly 20 percent of lesbians report having experienced verbal abuse or physical assault in secondary schools. Gibson, *supra*, at 3-112; *see also* Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 34 (G. Herek & K. Berrill eds. 1992); Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. Interpersonal Violence 295 (1990); Pilkington & D'Augelli, *Victimization of Lesbian, Gay, and Bisexual Youth in Community Settings*, 23 Am. J. Community Psychology 33

[10] A common thread in many of the accounts of suicidal ideation or suicide attempts by gay and lesbian adolescents is, as one person put it, that "I could not envision a life in which I could be happy and whole." Parlin, *We Don't Have a Problem Here, in One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* 219, 221 (K. Jennings ed. 1994).

(1995).[11] "The shame of ridicule and fear of attack makes school a fearful place to go resulting in frequent absences and sometimes academic failure." Gibson, *supra*, at 3-112 to 3-113. One researcher reports that 28 percent of the gay students he studied dropped out of school. *Id.* at 3-113. For those who remain, the discriminatory atmosphere in many schools "forces gay students to concentrate on survival rather than education and destroys gay teenagers' self-esteem during a crucial developmental period." Dennis & Harlow, *supra*, at 448.[12]

[11] This often is the case even at the higher-education level. Research on several college and university campuses indicates that gay and lesbian students are four times as likely to experience physical attacks—being chased or followed, having objects thrown at them, being spit at or physically assaulted, or being the targets of vandalism or arson—as are members of the general student population. D'Augelli & Dark, *supra*, at 185 (citing G. Comstock, *Violence Against Lesbians and Gay Men* (1991)); *see generally* D'Augelli, *Lesbian and Gay Male Undergraduates' Experiences of Harassment and Fear on Campus*, 7 J. Interpersonal Violence 383 (1992); Obear, *Homophobia, in Beyond Tolerance: Gays, Lesbians and Bisexuals on Campus* 46 (N. Evans & V. Wall eds. 1991).

[12] The high school experiences of numerous lesbians and gays demonstrate powerfully the difference that a secure learning environment can make. One gay educator remembers his own high school years in the following terms:

> I was taunted daily in the hallways, in the locker room, in classes before the teacher called the roll, even during class. Whenever I volunteered to answer a question or write on the board, a slightly audible murmur from my classmates would arise. "Faggot," I would hear. I learned not to volunteer or raise my hand.
>
> In Mr. Korn's class, it was different. While most teachers looked the other way in the face of this verbal onslaught, Mr. Korn made his class an oasis of safety. No one dared harass me there, perhaps because they feared Mr. Korn himself would take offense at the epithet. I was protected there, and Mr. Korn encouraged my participation. I found myself excelling in math, a feat never duplicated before or since in

The tragic consequences that can result from the public schools' failure to address the needs of gay and lesbian students are vividly illustrated by the following anecdote from the report of the Secretary's Task Force on Youth Suicide:

> In Lebanon, Pennsylvania in 1977, a 16-year old boy fatally shot himself before entering the 10th grade. He left a suicide note explaining he could not return to school and sustain the abuse and ridicule about being gay from his classmates. A few friends at school supported (him) though they knew he was gay, but the majority ridiculed him without mercy. He skipped classes to avoid the torture and welcomed the summer vacation as a respite. But he was already taking pills to escape the reality of the approach of another school term, when he would have to move from junior high to the even more sharply defined roles of senior high. On September 3 he shared that anxiety with a friend and on September 5 he shot and killed himself.

Gibson, *supra*, at 3-128.

There is no need to belabor the point. It is clear that the public schools must display particular concern for gay and lesbian students. To meet this obligation, the schools must, at the very least, provide an environment in which these at-risk students can feel sufficiently secure so that they can devote their energies to learning rather than to survival. The schools must, in addition, teach other students who are not themselves gay or lesbian the broader lesson of tolerance: that regardless of race, sex, religion, ethnic origin, disability, or any other distinguishing characteristic—such as sexual orientation—all people should be judged according to their individual merit rather than on the basis of invidious stereotypes. In Part II below,

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> my academic career . . . . I excelled because I mattered, and was valued, and was safe, all conditions created by Mr. Korn.

Jennings, *I Remember, in One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* 19, 20-21 (K. Jennings ed. 1994).

we explain why Amendment 2 undermines the ability of the public schools to perform both of these functions.

II. AMENDMENT 2 UNDERMINES THE ABILITY OF THE PUBLIC SCHOOLS TO MEET THE NEEDS OF GAY AND LESBIAN STUDENTS AND TO TEACH ALL STUDENTS THE BROADER LESSON OF TOLERANCE

A. In order to meet the needs of gay and lesbian students, the public schools must, at the very least, provide an environment in which these students can feel physically and emotionally secure. As a first step toward this end, it is essential that school districts be able to prohibit discrimination on the basis of sexual orientation. In June 1992, respondent Boulder Valley School District RE-2 adopted a policy that prohibits discrimination on the basis of race, color, creed, marital status, national origin, gender, disability, or *sexual orientation*, together with a grievance procedure through which students may seek recourse for violations of the policy. Amendment 2 would prevent implementation of this policy, insofar as discrimination on the basis of sexual orientation is concerned. By the same token, other Colorado school districts that, like Boulder Valley School District RE-2, sought to create an environment that is conducive to learning for all students—including gay and lesbian students—would be prevented from doing so by Amendment 2.

The adoption of these policies is important not only because they provide a means of recourse for gay and lesbian students who are subjected to discrimination. Perhaps more important is the signal such policies send—that gay and lesbian students have a place in society, and that harassment, violence, and other forms of discrimination will not be permitted. As this Court has noted, it is the "work of the schools" to make clear to their students that language and conduct "highly offensive or highly threatening to others" is disfavored, for "the essential

lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ." *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986).

Another pernicious effect of Amendment 2 is to chill the efforts of public schools to meet the needs of gay and lesbian students, which we discussed in Part I, *supra.* The importance of such efforts was highlighted recently by the report of the Massachusetts Governor's Commission on Gay and Lesbian Youth. Appointed by Governor William Weld as a result of concern over the high suicide rate among gay and lesbian adolescents and the other serious problems facing these young people, the Commission urged school districts to: establish policies protecting gay and lesbian students from harassment, violence, and discrimination; train teachers and counselors in suicide and violence intervention; establish support groups for gay and lesbian as well as "straight" students; include in school libraries information for gay and lesbian students; integrate discussion of gay and lesbian issues into the curriculum; and provide counseling for the families of gay and lesbian students. *Making Schools Safe, supra,* at 2.[13]

School districts in various parts of the country, and education-related organizations such as *amici,* have established programs that attempt to address the needs of gay and lesbian students. As the Massachusetts Governor's Commission found, such programs are essential: "Adults who work in Massachusetts schools are ill-equipped to meet the needs of lesbian and gay students. Either intimidated or ignorant, school staffs often fail to provide these young people with the support and even with the protection they need." *Id.* at 20; *see also* Remafedi, *The Impact of Training on School Professionals' Knowledge, Beliefs,*

[13] The Commission's report resulted in the enactment, in December 1993, of an "Act to Prohibit Discrimination Against Students in Public Schools on the Basis of Sexual Orientation." *See* Mass. Gen. L. ch. 76, § 5.

and Behaviors Regarding HIV/AIDS and Adolescent Homosexuality, 63 J. School Health 153 (1993). By way of example, *amicus* NEA conducts inservice training programs on "Affording Equal Opportunity to Gay and Lesbian Students Through Teaching and Counseling." These programs are designed to sensitize teachers to the needs of gay and lesbian students and to enhance teachers' ability to meet those needs. While programs of this type by NEA and other private entities would not *per se* be prohibited by Amendment 2, the Amendment might prevent school districts from funding teacher participation in these programs, and from themselves providing such in-service training. Moreover, NEA policy urges school districts to "provide counseling by trained personnel for students who are struggling with their sexual/gender orientation." NEA Handbook 1992-1993, at 263 (Resolution C-26). Such efforts by school districts to meet the needs of gay and lesbian students and to insure these students equal opportunity within the public education system would be contrary to the spirit, if not the letter, of Amendment 2.

As was discussed above, one of the reasons for despair among adolescents newly discovering their homosexual identity is the perception that they are now part of a despised minority, and have no prospect of success and happiness in their personal or professional lives. A powerful antidote to such despair can come from gay and lesbian teachers, who by their very presence can give hope to the confused adolescent—and who can provide understanding and knowledgeable counselors to whom these students can turn. *See generally One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* (K. Jennings ed. 1994). Not only do such teachers serve as important role models for gay and lesbian students, but they also help other students develop a more tolerant attitude toward their gay and lesbian classmates. As the Massachusetts Governor's Commission noted, "the key factor in

reducing fear and intolerance of gays and lesbians is a positive personal experience with an openly gay or lesbian person." *Making Schools Safe, supra,* at 20 (citing Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men,* 10 J. Homosexuality 1, 8 (1984)). But when gay or lesbian teachers reveal their sexual orientation they may—in the absence of a policy outlawing employment discrimination on the basis of sexual orientation—make themselves vulnerable to dismissal.[14]

A case in point is *Gaylord v. Tacoma School Dist. No. 10,* 559 P.2d 1340 (Wash.), *cert. denied,* 434 U.S. 879 (1977), in which a Washington state high school teacher—who had counseled a student troubled about

[14] Some anti-gay and lesbian spokespersons object to the presence in the classroom of gay and lesbian teachers because they contend that it leads to the "recruitment" of students to homosexuality. This contention wholly ignores the overwhelming evidence that sexual orientation is established by a very early age and is thereafter highly resistant to change. *See* Burr, *supra*; Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality* 133, 148-52 (1991); Dennis & Harlow, *supra,* at 465; Green, *supra,* at 555-69; Stoller & Herdt, *Theories of Origins of Male Homosexuality: A Cross-Cultural Look,* 42 Arch. Gen. Psychiatry 399 (1985). Furthermore, research has failed to find any evidence that children of gay or lesbian parents—the type of role model most likely to be influential—are less well adjusted or any different in their development of gender identity and sexual orientation than children of heterosexual parents. Herek, *Myths About Sexual Orientation, supra,* at 157-61.

A second argument against the presence of gays in the classroom is that they are more likely than heterosexual men to molest children. This argument also is without foundation in fact. *See id.* at 152-56. It appears to rest in large part on the inaccurate assumption that males who molest male children are homosexual with respect to their adult sexual orientation. Many child molesters never have developed the capacity for mature sexual relations with other adults, either men or women; and those who have are no more likely to have a homosexual than a heterosexual orientation. *Id.* at 153-55; Groth & Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons,* 7 Arch. Sexual Behav. 175, 176-77 (1978).

his own sexual identity—was dismissed when the teacher's homosexuality became publicly known. The discharge, which was upheld by the Washington Supreme Court, was based on the expansive charge of "immorality"—which constitutes a ground for dismissal under the teacher tenure laws of many states. *See, e.g.,* Colo. Rev. Stat. § 22-63-301. Quite apart from the question of employment discrimination, such discharges of openly gay and lesbian teachers reinforce the stigma felt by gay and lesbian students. Dennis & Harlow, *supra,* at 473.

Even prior to Amendment 2, and after respondent City of Denver had enacted an ordinance barring employment discrimination based on sexual orientation, gay and lesbian teachers in the Denver School District were reported to be insecure about the extent to which they could, without fear of reprisal, counsel gay and lesbian students. Stevens, *Help Is Scant for Gay Students: Area High Schools Offer Little Counsel,* Denver Post, Dec. 2, 1990, at 1A. Without the protection of policies that prohibit employment discrimination on the basis of sexual orientation—which are precluded by Amendment 2—it is even less likely that gay and lesbian teachers will take the risk of counseling those of their students who badly need such support.

B. Not only does Amendment 2 undermine the ability of the public schools to meet the needs of gay and lesbian students, but it impacts more broadly on the educational mission of the public schools. In raising discrimination against those perceived as different to the level of high constitutional principle, Amendment 2 calls into question one of the most important values the public schools attempt to teach their students—tolerance and respect for those who are different. As one observer has noted, homophobia is "similar in nature and dynamic to all other prejudices including anti-Semitism, racism, and sexism." Martin, *supra,* at 52; *see also* Bierly, *Prejudice Toward Contemporary Outgroups as a Generalized Attitude,* 15 J. Applied Social Psychology 189 (1985). If

invidious discrimination on the basis of fears and prejudices about homosexuality is deemed to be reasonable, acceptable, and legal behavior, then it is difficult to see how the schools can discourage their students from similarly giving effect to equally irrational fears and prejudices about those who differ by race, religion, or ethnicity.

Through Amendment 2 the State officially sanctions discrimination against certain of its citizens, just as surely as did the anti-Semitic laws of Nazi Germany or the Jim Crow legislation of an earlier period in this country. It is illusory to believe that a state-created norm of intolerance, once called into existence, can be limited to its avowed object. "Prejudice, once let loose, is not easily cabined." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring).

Amici believe that the public schools are the agency of society that is most responsible for bringing about appreciation for diversity and respect for the rights and dignity of all. Yet it is plain that the schools will not be able to persuade students of these fundamental values if the State asserts as a matter of constitutional principle that invidious discrimination against one particular minority group is acceptable. It is this that may be the most tragic legacy of Amendment 2, should it be permitted to stand.

CONCLUSION

The judgment of the Supreme Court of Colorado enjoining the implementation of Amendment 2 as contrary to the Constitution of the United States should be affirmed.

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT NEED NOT DECIDE WHETHER GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS. 4

II. GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS. 5

A. Heightened Judicial Scrutiny Is Mandated When Ordinary Processes Of Governmental Decision-making Are Suspect. . . 5

B. The Fact that Sexual Orientation is Unrelated to Ability Presents a Warning Sign to the Courts. 7

1. A Classification Based on a Characteristic Unrelated to Ability Presents a Warning Sign to the Courts. 7

2. Sexual Orientation is Unrelated to Ability. 8
C. The Fact that Gay Men, Lesbians, and Bisexuals Have Suffered a History of Discrimination is a Warning Sign to the Courts. 9
A. History of Discrimination Presents a Warning Sign to the Courts. 9
2. Gay Men, Lesbians, and Bisexuals Manifest a History of Discrimination. 12
D. The Fact that Gay Men, Lesbians, and Bisexuals Face Obstacles in the Political System Reinforces Other Warning Signs. 15
1. Political Powerlessness Presents a Warning Sign to the Courts. 16
. 16
2. Gay People and Political Powerlessness 18
E. The Fact that Sexual Orientation is a Characteristic For Which an Individual is Not Responsible Presents a Warning Sign to the Court. 21
1. Lack of Responsibility 22
2. Passive Characteristic 23
III. BOWERS V. HARDWICK DOES NOT PRECLUDE A FINDING THAT CLASSIFICATIONS DRAWN ON THE BASIS OF SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY. 25
A. The Substantive Due Process Issue Decided in *Hardwick* Does not Decide the Equal Protection Issue. 26
B. Sodomy Does Not Define The Class Of Homosexuals. 28
CONCLUSION 30

TABLE OF AUTHORITIES

CASES

J.E.B. v. Alabama, 114 S.Ct. 1419 (1994) 6

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 12, 20, 21, 25, 28

Bowen v. Gilliard, 483 U.S. 587 (1987) 11

Bowers v. Hardwick, 478 U.S. 186 (1986) . 4, 24-26, 28, 30

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 7, 8, 10, 17, 22

Duggan v. Brown, 420 U.S. 916 (1975) 14

Equality Found. of Greater Cincinnati v. City of Cincinnati, No. 94-3855, 1995 U.S. App. LEXIS 10462 (6th Cir. May 12, 1995) 25

Evans v. Romer, No. 92-CV7223, 1993 WL 518586, (Colo. Dist. Ct. Dec. 14, 1993) 20, 21

Foley v. Connelie, 435 U.S. 291(1978) 16, 17

Frontiero v. Richardson, 411 U.S. 677(1973) 3, 6-8, 10-12, 16, 22

Graham v. Richardson, 403 U.S. 365 (1971) 6, 11

Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993) . . 6

Heller v. Doe, 113 S.Ct. 2637 (1993) 5

High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) 12, 21, 28

Hirabayashi v. United States, 320 U.S. 81 (1943) 11

Hunter v. Erickson, 393 U.S. 385 (1969) 20

In Re Thom, 301 N.E.2d 542 (N.Y. 1973) 14

Korematsu v. United States, 323 U.S. 214, 216 (1944) . 6

Lyng v. Castillo, 477 U.S. 635 (1986) 10, 11

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 10, 11, 20

McLaughlin v. Florida, 379 U.S. 184 (1964) 6, 8

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 6

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) . 12, 25, 28

Parham v. Hughes, 441 U.S. 347(1979) 5

Plyler v. Doe, 457 U.S. 202 (1982) 2, 5-8, 10, 22

Reitman v. Mulkey, 387 U.S. 369 (1967) 20

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 16, 20

State ex rel. Grant v. Brown, 313 N.E.2d 847 (Ohio 1974), cert. denied sub nom 14

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

Watkins v. U.S. Army, 847 F.2d 1329, 1357 (1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) 30

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) . 23, 27

Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972)22

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 103 (1990) 21, 25, 28

CONSTITUTIONS AND STATUTES

42 U.S.C. § 2000e 17

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INTEREST OF AMICI CURIAE

Amici are a variety of organizations from across the country that are deeply concerned about and affected by Colorado's Amendment 2. *Amici* include several national organizations dedicated to the protection of civil rights, including the Human Rights Campaign Fund, the National Gay and Lesbian Task Force, the National Lesbian and Gay Law Association, the National Center for Lesbian Rights, the Gay and Lesbian Medical Association, the Union of American Hebrew Congregations, the National Asian Pacific American Legal Consortium, the National Organization for Women and the NOW Legal Defense and Education Fund.

Amici also include state organizations concerned about discrimination, including the Connecticut Women's Education and Legal Fund, Inc., the Gay and Lesbian Law Association of Florida, the Oregon Gay and Lesbian Law Association, Bay Area Lawyers for Individual Freedom, Lawyers for Human Rights - the Lesbian and Gay Bar Association of Los Angeles, Orange County Lawyers for Equality Gay and Lesbian, and the Tom Homann Bar Association of San Diego.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in Appendix A.

INTRODUCTION

The people of Colorado have voted to remove from one group of citizens the right to seek anti-discrimination protection through ordinary political means. Petitioners

claim that such an action violates the Equal Protection Clause only if governmental classifications based on the group's characteristic would otherwise warrant "strict scrutiny." Petitioners misconstrue the principles of the Fourteenth Amendment. *Amici* submit that this Court should affirm the decision below regardless of the level of scrutiny otherwise applied to governmental classifications based on sexual orientation.

If the Court accepts Petitioners' premise, the decision below should still be affirmed because classifications based on sexual orientation warrant strict scrutiny.

SUMMARY OF ARGUMENT

1. The principle of separation of powers requires courts to be deferential to most forms of state action. The Fourteenth Amendment, however, also requires that courts strictly scrutinize certain state actions that may be "inconsistent with elemental constitutional premises." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

2. This Court has never specified an absolute checklist of criteria for heightened judicial review. Rather, the Court has applied strict scrutiny when it has concluded that ordinary processes of governmental decision-making with regard to a classification are not working properly. This Court has identified various warning signs that indicate governmental processes are suspect. A number of these warning signs are present in the case of classifications based on sexual orientation and indicate that strict scrutiny is warranted.

4. A key warning sign is that a governmental

classification is based on a characteristic that bears "no relation to the individual's ability to participate in and contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). An individual's sexual orientation -- be it homosexual, heterosexual, or bisexual -- is irrelevant to that person's ability to perform and contribute to society.

5. A second warning sign is a history of intentional discrimination against the group targeted by the governmental classification. Gay men and lesbians, like women and like racial and ethnic minorities, have experienced extreme and blatant discrimination, followed by a more recent history of sometimes subtle, sometimes overt discrimination.

6. A third warning sign is political powerlessness on the part of the group targeted by the governmental classification. This sign tends to be most relevant when the group is effectively shut out completely from the political process. However, the fact that a group faces ongoing obstacles in the political system, as gay men and lesbians do, reinforces the warning signs noted above.

7. A fourth warning sign is the immutability of the characteristic targeted by the governmental classification. One meaning of immutability revolves around the concept of lack of responsibility in acquiring the characteristic at issue. This meaning of immutability is an appropriate warning sign and sexual orientation is an example of this type of immutable characteristic. The second meaning of immutability pertains to a "passive" characteristic that has no behavioral aspects. This meaning stems from an *ex ante* analysis of classifications that have warranted strict scrutiny and is not a warning sign for strict scrutiny.

8. This Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986) does not preclude the conclusion that classifications based on sexual orientation warrant strict scrutiny. While there is no substantive due process right to engage in homosexual sodomy, that does not mean that invidious discrimination against gay people is not a violation of the Equal Protection Clause. Moreover, since sodomy does not define the class of homosexuals, there is nothing in the logic of the *Hardwick* decision that makes strict scrutiny for gay people incongruous.

ARGUMENT

I. THIS COURT NEED NOT DECIDE WHETHER GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS.

Respondents have presented two arguments to this Court -- first, that Amendment 2 burdens a fundamental right to participate in the political process and fails constitutional muster under a standard of strict scrutiny; and second, that Amendment 2 fails constitutional muster even if scrutinized under a lenient "rational review" standard.

Petitioners argue that this Court may subject Amendment 2 to strict scrutiny only if classifications based on sexual orientation receive the same level of scrutiny as classifications based on race. Pets. Brief at 18-24. *Amici* disagree and believe Petitioners have misconstrued the principles of the Fourteenth Amendment and relevant precedent. *See generally Amicus* Brief of the Colorado Bar Association et al.

Even if this Court accepts Petitioners' premise, it should affirm the decision below because classifications based on sexual orientation warrant strict scrutiny by the courts.[1]

II. GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS.

A. Heightened Judicial Scrutiny Is Mandated When Ordinary Processes Of Governmental Decision-making Are Suspect.

The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). But "the initial discretion to determine what is 'different' and what is the 'same' resides in the legislatures of the States." *Id.* Legislatures establish classifications in numerous contexts and must have substantial latitude to decide what classifications meet the needs of society. *See Parham v. Hughes*, 441 U.S. 347, 351 (1979). Respectful of the separation of powers inherent in our system, courts are appropriately deferential to most forms of state action, requiring simply that there be a "rational relationship between the disparity of treatment and some legitimate government purpose." *Heller v. Doe*, 113 S.Ct. 2637, 2642 (1993).

The Fourteenth Amendment, however, requires that

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[1] Respondents have not "strategically waived" the claim that governmental classifications based on sexual orientation should be accorded heightened scrutiny. That claim was simply irrelevant to the argument presented by Respondents to this Court.

courts not treat every classification so deferentially. "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises." *Plyler*, 457 U.S. at 216. Thus, in limited circumstances, the Fourteenth Amendment requires that courts affirmatively intervene by scrutinizing certain governmental actions more closely. The issue this brief addresses is how courts know when to undertake this more rigorous review of governmental line-drawing.

This Court has not specified a checklist of criteria that must always be met in order to warrant heightened scrutiny. Rather, the Court has identified indicia of suspectness as Fourteenth Amendment jurisprudence has evolved. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944), ("[i]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (because central purpose of the Fourteenth Amendment was to eradicate governmental racial discrimination, such classifications are strictly scrutinized); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971)"([a]liens as a class are a "prime example of a 'discrete and insular' minority" for whom heightened scrutiny is appropriate); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality) (history of discrimination against women based on a characteristic that has no relevance to ability demands strict scrutiny of gender-based classifications).[2]

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[2] Whether gender-based classifications are "inherently suspect" is an open question for this Court. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 & n.9 (1982); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 373 (1993) (Ginsburg, J., concurring); *J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 n.6 (1994). *Amici* believe gender-based

At bottom, this Court has applied strict scrutiny when it has concluded that the ordinary processes of governmental decision-making with regard to a classification are not working properly, such that separation of powers requires judicial intervention. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). In *Plyler v. Doe*, 457 U.S. 202, 216 (1982), and in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985), two cases in which the Court declined to extend heightened scrutiny to a challenged classification, the Court identified various "red flags," or warning signs, that indicate a valid concern with governmental processes is present.

B. The Fact that Sexual Orientation is Unrelated to Ability Presents a Warning Sign to the Courts.

1. A Classification Based on a Characteristic Unrelated to Ability Presents a Warning Sign to the Courts.

One warning sign this Court has identified is that the classification is based on a characteristic that bears "no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). When a characteristic is irrelevant to an individual's ability to perform or participate in society, a classification based on that characteristic is unlikely to be relevant to the achievement of any legitimate state interest. Rather, laws based on such characteristics "are deemed to reflect

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classification should be subject to strict scrutiny.

prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. Laws based on such characteristics may also, as gender-based classifications often do, "reflect outmoded notions of the relative capabilities" of those who hold such characteristics. *Id.* at 44 (citing *Frontiero).* In either case, the courts have reason to be concerned that the classification is not the result of "legislative rationality in pursuit of some legitimate objective," but rather, a reflection of "deep-seated prejudice." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

Thus, in *Cleburne*, classifications based on mental retardation were not subject to strict scrutiny. "[I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the every day world." 473 U.S. at 442. Because mental retardation was a characteristic that affected an individual's ability to participate effectively in society, the Court had a basis for presuming that the State had a legitimate interest in passing laws that specifically classified on the basis of mental retardation. *Id.* at 442-43.

By contrast, it was apparently understood by the courts that characteristics such as race and ethnicity were not relevant to an individual's ability to perform in society. The Court's comment in *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), that racial classifications are "in most circumstances irrelevant" to any acceptable legislative purpose reflects this understanding. And the Court explicitly noted that gender "frequently bears no relation to ability to perform or contribute," *Frontiero*, 411 U.S. at 686, thus justifying for the plurality in that case strict scrutiny for gender-based classifications.

2. Sexual Orientation is Unrelated to Ability.

An individual's sexual orientation -- be it homosexual, heterosexual, or bisexual -- is irrelevant to that person's ability to perform and contribute to society. The once prevalent view that homosexuality was a form of mental illness has long been rejected by the medical and scientific communities. *See* Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Protective Techniques 17 (1957); Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy* 115-136 (Weinrich and Gonsiorek, eds., 1991). The American Psychological Association and the American Psychiatric Association have affirmed for more than two decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Resolution of the American Psychiatric Association, Dec. 15, 1973; Resolution of the Council of the Representatives of the American Psychological Association, 30 Am. Psychologist 633 (1975).

The simple truth is that gay people demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted, while some are not; some are strong, while others are weak; some are mentally or physically disabled, but most are not. The constant factor is that a person's *sexual orientation* is not the determinative element in any of these abilities.

C. The Fact that Gay Men, Lesbians, and Bisexuals Have Suffered a History of Discrimination is a Warning Sign to the Courts.

A. History of Discrimination Presents a Warning Sign to the Courts.

A second warning sign noted by this Court is a history of intentional discrimination against the targeted group. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero*, 411 U.S. at 684. A history that provides evidence of antipathy towards a group, or of stereotypical views of a group, provides the courts with another red flag that the ordinary processes of governmental decisionmaking may be suspect with regard to the classification at issue. *See Plyler*, 457 U.S. at 217 n.14; *Cleburne*, 473 U.S. at 443; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

For example, this Court's assumption in *Cleburne* that classifications based on mental retardation were not the result of political decisionmaking gone awry was buttressed by the Court's assessment of recent federal and state actions. The Court noted that "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded, demonstrates ... that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." 473 U.S. at 443.

Similarly, in *Murgia*, the Court declined to subject a law mandating retirement for state police over the age of 50 to strict scrutiny. The Court noted that the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313. And when the Court was faced with the claim that nuclear families, made up of

parents, children, and siblings, should receive heightened scrutiny, the Court gave that claim short shrift -- partly because of the lack of any history of discrimination or antipathy against the group at issue. *Lyng*, 477 U.S. at 638; *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

As a practical matter, the classification must target a characteristic that renders a person vulnerable to discrimination -- either a characteristic that is generally superficially evident and immediately renders the individual vulnerable to discrimination (e.g., gender, race, and some ethnicities), or a characteristic that may be disclosed and subsequently renders the individual vulnerable to discrimination (e.g., alienage, illegitimacy, religion and some ethnicities and races). The Court's sporadic comments describing characteristics of vulnerable groups as "obvious" or "distinguishing," *see, e.g.*, *Murgia*, 427 U.S. at 313-14; *Lyng*, 477 U.S. at 638 (quoting *Murgia*), relate to this practical requirement.

As with other warning signs, a history of discrimination is simply one of the red flags designed to alert the Court to the possibility that the processes of state decisionmaking may be suspect. With regard to some classifications, the history of discrimination may have been obvious to the Court and so did not require explicit discussion. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (ethnicity); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). In *Frontiero*, 411 U.S. at 685, by contrast, the Court reviewed at length the "gross, stereotyped distinctions between the sexes" and blatant discrimination against women that existed throughout much of the 19th century. The Court observed that while "the position of women in America has improved markedly in recent decades . . . women still face pervasive, although at

times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Id.* at 685-86 (footnoted deleted). This history of discrimination, coupled with the warning sign that gender frequently bore no relation to ability, were sufficient for the plurality to justify strict scrutiny for gender-based classifications.

2. Gay Men, Lesbians, and Bisexuals Manifest a History of Discrimination.

Like women, and like racial and ethnic minorities, gay men, lesbians and bisexuals have experienced an early history of extreme and blatant discrimination, followed by a more recent history of sometimes subtle, sometimes overt discrimination.[3]

Overt and systematic discrimination against gay men and lesbians began in earnest after changes in our economic and social culture, at the turn of the century, allowed for the development of a "homosexual identity." *See* Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 200-02 (1988) [hereinafter Law]; J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America*, 226-27 (1988) [hereinafter D'Emilio & Freedman]. These changes resulted in the development of gay communities in some urban centers. D'Emilio & Freedman at 288-91. Even this

[3] Every court that has addressed this issue has concluded that gay men and lesbians have been subject to a history of discrimination. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987).

limited public visibility of gay people, however, resulted in a crackdown on the ability of gay people to congregate. Police raids on gay bars and the arrest of patrons were common; patrons frightened of publicity rarely challenged any charges. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993) [hereinafter Cain].

In the 1950s, discrimination against gay men and lesbians by the state intensified, setting a norm for private actors. D'Emilio & Freedman, *supra*, at 292-95. In 1950, the Senate directed a Senate Investigations Subcommittee "to make an investigation into the employment by the Government of homosexuals and other sex perverts." Cain, *supra*, at 1565-66 (quoting S. Doc. 241, 81st Cong., 2d Sess. 1 (1950)). The Subcommittee concluded that homosexuals were unfit for employment because they "lack the emotional stability of normal persons" and recommended that all homosexuals be dismissed from government employment. *Id.* at 1566. In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were "sex perverts." *Id.* From 1947 through mid-1950, 1700 individuals were denied employment by the federal government because of their alleged homosexuality. *Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989) (footnote omitted).

The 1950's witnessed the development of organizations that were precursors to the modern gay civil rights movement. *Id.* at 1515-16. The late 1960's witnessed the birth of the modern gay rights movement, with its growth aided by the women's movement. *See* Law, *supra*, at 206-12. And in the mid-70s, the psychiatric

profession officially confirmed that homosexuals were not emotionally unstable. R. Bayer, *Homosexuality and the Politics of Diagnosis* 18-40 (1981).

Discrimination against gay people continued through these years, and up to the present, albeit now in different forms. In the mid-1950s, almost all gay people assumed that survival required they hide their sexual orientation completely--from friends, family, and co-workers. Thus, discrimination primarily took the form of affirmatively ferreting out, harassing and/or purging gay people from public areas such as bars and government employment. Over the last forty years, more gay people have refused to hide their orientation. Honesty, however, has brought targeted discrimination. In an outstanding example, Lambda Legal Defense and Education Fund, the first gay legal organization, was able to incorporate only by virtue of a court injunction, *see In Re Thom*, 301 N.E.2d 542 (N.Y. 1973), and other advocacy groups were not as fortunate, *see State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974), *cert. denied sub nom. Duggan v. Brown*, 420 U.S. 916 (1975).

Most gay men and lesbians today continue to opt for silence and the hiding of their true identities. A 1992 survey of 1,400 gay men and lesbians in Philadelphia showed that 76% of men and 81% of women conceal their sexual orientation at work. *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Committee on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy). Gay people hide their distinguishing characteristic based on fear and experience. A review of twenty surveys conducted across this country between 1980

and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment. *Id.* A 1987 Wall Street Journal poll of Fortune 500 executives indicated that 66% of these executives would hesitate to give a management job to a gay person. *Id. See also id.* at 6 (testimony of Cheryl Summerville) (Summerville's separation notice from Cracker Barrel restaurant read: "This employee is being terminated due to violation of company policy. This employee is gay.")

Gay men and lesbians, like Jews or members of some ethnic groups, and unlike women or racial minorities, sometimes are able to hide their distinguishing characteristic by disguising or lying about their personal interests, relationships, and activities. But this socially-imposed pressure to "pass" is itself a form of discrimination. Indeed, constantly keeping secret an important part of one's identity can create shame, undermine self-respect, and increase stress levels. *See id.* at 70 (statement of Carnevale); Law, *supra*, at 212. This pressure to "pass" is not a far cry from the pressure on Jews in the early-to-mid 1900s to hide their identity so as to increase their employment success in certain occupations.

The history of discrimination against gay men and lesbians, coupled with the fact that sexual orientation bears no relation to ability, are sufficient to justify strict scrutiny of classifications based on sexual orientation. These red flags indicate to the Court that the ordinary processes of governmental decisionmaking are suspect when applied to classifications based on sexual orientation.

D. The Fact that Gay Men, Lesbians, and Bisexuals Face

Obstacles in the Political System Reinforces Other Warning Signs.

1. Political Powerlessness Presents a Warning Sign to the Courts.

This Court has rarely concluded, as an affirmative matter, that a classification based on a characteristic that warrants strict scrutiny targets a class which is politically powerless. For example, the Court did not discuss political powerlessness when it applied heightened scrutiny to classifications based on race, ethnicity or illegitimacy. In *Frontiero*, 411 U.S. 677, the Court discussed the underrepresentation of women in the political arena, but did so as an example of the "pervasive, although at times more subtle, discrimination" against women. *Id.* at 686. Only in a case concerning alienage did the Court affirmatively note that aliens deserve "heightened judicial solicitude" because "aliens -- pending their eligibility for citizenship, -- have no direct voice in the political processes." *Foley v. Connelie*, 435 U.S. 291, 294 (1978).

The Court has, however, noted the fact of political powerlessness among a list of "traditional indicia" of suspectness. In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court noted that a class "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts . . . [has] none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

In *Cleburne*, after concluding that mental retardation is a characteristic that affects the ability of individuals to perform and that legislatures were responding to the concerns of people with mental retardation in a manner "that belies a continuing antipathy or prejudice," 473 U.S. at 443, the Court also noted that the legislative response negates the claim that people with mental retardation are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445.

Almost all groups currently accorded heightened scrutiny by the Court, however, are not so politically powerless that "they have no ability to attract the attention of the lawmakers." *Id.* Indeed, today most racial, ethnic, and religious minority groups and women have representatives of their groups in state and national legislatures, work in coalitions, and enjoy the support of political figures. *See* Caplan, *A History of the Leadership Conference on Civil Rights, in Leadership Conference on Civil Rights 45th Anniversary* 10 (1995). And legal redress for discrimination against members of these groups is available through state and federal laws. *See, e.g.*, 42 U.S.C. § 2000e.

The most appropriate way to view the factor of political powerlessness, therefore, is to view it simply as another warning sign courts use in their efforts to determine the answer to their underlying question -- is governmental decisionmaking with regard to the classification suspect? This warning sign may be sufficient on its own if a group is effectively closed out of the political process completely. *See Foley*, 435 U.S. at 294. Other groups who are not shut out of the political process completely may often, nevertheless, have experienced a

history of exclusion from the process -- because they were denied the right to vote, or because representatives of the group were unlikely to be elected, or because it was difficult for them to organize and form coalitions. If coupled with the other warning signs, these factors may reinforce the court's judgment that judicial intervention is appropriate.

2. Gay People and Political Powerlessness

Like women, and like racial and ethnic minorities, gay people manifest a history of significant exclusion from the political system, followed by a continuing period of overcoming obstacles in the system. While gay people have never been denied explicitly the right to vote, they have historically been effectively excluded as visible participants in the system. In recent years, although some openly gay people have been elected to local councils, state legislatures, and Congress, such representatives are still markedly fewer in number than representatives from other minority groups, primarily because a candidate's open homosexuality is still a significant disadvantage in the political arena. According to the Gay and Lesbian Victory Fund, only 83 of the 511,039 elected officials (less than .02%) currently serving in the United States are openly gay.

Despite the presence of some openly gay representatives, gay people still face significant obstacles in the political process. Most gay people avoid prejudice by attempting to keep their sexual orientation secret. This poses a particular problem for political organizers who "somehow ... must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may

involve." B. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 718-42 (1985). *See also* Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 U.C.L.A. L. Rev. 915, 970-973 (1989) [hereinafter Halley].

The fact that many gay people hide their orientation also affects the ability of gay groups to form coalitions. As Professor Ely observes, social interaction is critical for destroying the stereotypes that "ameliorate . . . cooperation-blocking prejudice." J. Ely, *Democracy and Distrust* 161 (1980). While non-gay people interact with gay people all the time, that interaction does not necessarily help diminish stereotypes "since a person's homosexuality is not normally a characteristic of which others become aware simply, say, by working with him or her." *Id.* at 162-163. And gay people cannot easily correct those stereotypes by stating their homosexuality and then serving as counterexamples to the stereotypes because, as a result of "the prejudices of many of the rest of us there would be serious social costs involved in such an admission." *Id.* at 163. As Professor Ely concludes, "[i]t is therefore a combination of the factors of prejudice and hideability that renders classifications that disadvantage homosexuals suspicious." *Id.* at 163-164.

Gay people also find it difficult to form coalitions because groups that would ordinarily join forces with other underprivileged groups sometimes hold back because they face conflict from within their own constituencies on the issue of sexual orientation. *See, e.g.*, Dalton, *AIDS in Blackface*, Daedalus, Summer 1989, at 205 (discussing homophobia in the African-American community). And some sympathetic, non-gay policymakers may be afraid to take any favorable action on gay rights issues because such

actions might earn the individual a perceived homosexual identity, with all the attendant burdens. *See* Halley, *supra*, at 973.

Gay people have slowly begun to achieve a few successes in the political arena, as evidenced through the passage of some local and state anti-discrimination laws. But having done so, gay people now face a new obstacle in the political arena. In response to these limited successes, states such as Colorado and cities such as Cincinnati, have changed the rules of the game so that gay people must first achieve repeal of limitations imposed by a ballot initiative before they can achieve passage of anti-discrimination legislation. *Compare Reitman v. Mulkey*, 387 U.S. 369 (1967) *and Hunter v. Erickson*, 393 U.S. 385 (1969) (a similar "moving of the goal posts" technique used against racial and religious minorities). Indeed, it would be a supreme irony if this Court were now to use the purported political power of gay people as a rationale for upholding an initiative that shuts them out of the political system on the crucial issue of discrimination.

The history of gay people's political powerlessness, and the significant obstacles gay people continue to face in the political arena, serve as an additional warning sign to the courts, reinforcing the judgment drawn from the other warning signs that governmental classifications based on sexual orientation are suspect.[4]

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[4] A few courts have concluded that classifications based on sexual orientation do not warrant strict scrutiny because gay people are "not without growing political power," *see Ben-Shalom*, 881 F.2d at 466; *High Tech Gays*, 895 F.2d at 574 n.10; *Evans v. Romer*, No. 92-CV7223, 1993 WL 518586, *12 (Colo. Dist. Ct. Dec. 14, 1993). These courts miss the point entirely. The list of "traditional indicia" of suspectness noted in cases such as *Rodriguez* and *Murgia*, are not designed as a mechanical checklist. Rather, they are guideposts for the courts that must make the difficult and nuanced judgment of whether the processes of governmental decisionmaking are suspect with regard to a classification. That judgment is appropriately made by analyzing and weighing all the warning signs -- not by simply observing the presence of a few openly gay representatives, *see Ben-Shalom*, 881 F.2d at 466, the passage of some anti-discrimination laws, *see High-Tech Gays*, 895 F.2d at 574, or the fact of a successful coalition effort by a gay group, *see Evans*, at *12.

E. The Fact that Sexual Orientation is a Characteristic For Which an Individual is Not Responsible Presents a Warning Sign to the Court.

Some courts have concluded that classifications based on sexual orientation do not deserve heightened scrutiny, partly because "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 103 (1990); *see also High Tech Gays*, 895 F.2d at 573 (same).

These courts err by transforming a warning sign into a rigid prerequisite. More fundamentally, these courts err by misapprehending the significance of "immutability" in this Court's jurisprudence. These courts have ascribed two meanings to the term "immutability." The first meaning, which this Court has adopted as a warning sign, revolves around the concept of "lack of responsibility" and relates to the premise that it is unfair to penalize an individual for a characteristic over which the individual has had no responsibility in acquiring. The second meaning, which this Court has never endorsed as a warning sign, revolves around the concept of "passivity," in the sense of

referring to a "passive" characteristic that has no behavioral aspects.

1. Lack of Responsibility

The fact that a characteristic which identifies a group is one over which group members have had no responsibility in acquiring has been used by the Court as a warning sign that heightened scrutiny is appropriate. For example, in *Frontiero*, 411 U.S. at 686, the Court noted that sex is "an immutable characteristic determined solely by the accident of birth" and therefore "the imposition of special disabilities because of ... sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . . '" *But see Cleburne*, 473 U.S. at 442-42 & n.10 (fact of immutability not sufficient where trait correlates with ability.)

The fact that a characteristic is an accident of birth has also served to enhance the Court's scrutiny with regard to two other classifications. In *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972), the Court articulated a "rational basis" standard for classifications based on illegitimacy, but invalidated the challenged statute because punishing an infant for a status of birth it could not control was "unjust and illogical." *Id.* at 175. Similarly, in *Plyler*, 457 U.S. 202, a case concerning denial of education to children of undocumented aliens, the Court relied on the fact that the challenged classification "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status," *id.* at 223, as a "countervailing cost" that reduced the rationality of the state action.

Thus, the fact that an individual has had no

responsibility in acquiring a characteristic has been relevant to the Court as a warning sign in some cases. With regard to this concept of immutability, sexual orientation is akin to gender, race, ethnicity and other similar characteristics.

There is no consensus yet in the scientific community as to whether an individual's sexual orientation (be it homosexual, heterosexual or bisexual) is determined by an individual's genetic makeup, hormonal factors, social environment, or a combination of any of the above. *See* Burr, *Homosexuality and Biology*, Atlantic Monthly, Mar. 1993, at 47. It is clear, however, that none of these factors is under an individual's control. Moreover, although the exact origins of sexual desire are unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed by a simple decision-making process or by medical intervention. *See* Coleman, *Changing Approaches to the Treatment of Homosexuality, in Homosexuality: Social, Psychological and Biological Issues* 81-88 (W. Paul et al. eds., 1982). Trial Tr. at 88-91 (testimony of Dr. Gonsiorek). As Judge Norris observed in *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (concurrence), we do not assume heterosexuals can easily "shift the object of their sexual desires to persons of the same sex," as well as "abstain from heterosexual activity." Science and medicine indicate the same is true of homosexuals. Thus, sexual orientation per se is not a characteristic over which an individual has had responsibility in acquiring.

2. Passive Characteristic.

While an individual has no responsibility in acquiring his or her sexual orientation, each individual

must decide how to respond to that innate orientation -- an issue that does not arise so plainly in race or gender. An *ex ante* analysis of the classifications to which the Court has accorded heightened scrutiny has resulted in the conclusion for some courts that a characteristic must be passive -- i.e., must exhibit no behavioral components -- in order for it to warrant heightened scrutiny.

This conclusion must be wrong. There is nothing in the logic of this Court's equal protection jurisprudence that would find any relevance in the fact that a characteristic carries with it certain behaviors. For example, while classifications based on religion are strictly scrutinized because they implicate a fundamental right, *see* U.S. Const. amend. I, such classifications would presumably also raise the warning signs discussed above. It would be irrelevant, in that analysis, that the practices of various religions were inextricably intertwined with various behaviors, such as prayer, fasting, saying blessings, eating certain foods etc.

Thus, the argument that classifications based on sexual orientation fail to warrant strict scrutiny because sexual orientation is not a "passive characteristic" must necessarily speak to a different point. The only possible point is that the decision to *respond* to one's natural sexual orientation (assuming it is a homosexual one) by engaging in the behaviors that are *normal* to that orientation (i.e., having a physical and emotional involvement with a person of the same gender) is wrong and removes the possibility of heightened scrutiny.

This argument thus becomes a variant on the theme that this Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986) compels the conclusion that classifications

based on sexual orientation must receive rational basis review. *See infra*, Section III. But the only relevant activity in this society that has been criminalized is the act of sodomy. To the extent an individual desires to engage in sodomy as a means of expressing his or her sexual orientation (be it homosexual or heterosexual), that may be prohibited by the state. But governmental classifications based on homosexuality or bisexuality are not classifications based on sodomy. Rather, they are classifications based on an individual's orientation and an individual's decision to respond to that orientation with a set of behaviors -- many of which do not include sodomy. *See infra*, Section III.

III. BOWERS V. HARDWICK DOES NOT PRECLUDE A FINDING THAT CLASSIFICATIONS DRAWN ON THE BASIS OF SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY.

The reason most often used by courts to conclude that governmental classifications based on sexual orientation do not warrant heightened scrutiny is this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Courts of Appeals in the District of Columbia, *see Padula v. Webster*, 822 F.2d 97, 102-03 (D.C.Cir. 1987), the Seventh Circuit, *see Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 1994 U.S. 1004 (1990), the Ninth Circuit, *see High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), the Federal Circuit, *see Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 103 (1990) and most recently, the Sixth Circuit, *Equality Found. of Greater Cincinnati v. City of Cincinnati*, No. 94-3855, 1995 U.S. App. LEXIS 10462, at *16 (6th Cir. May 12, 1995), have

all held that this Court's decision in *Hardwick* compels the conclusion that classifications based on sexual orientation deserve no more than rational basis review. These decisions rest on two faulty premises.

A. The Substantive Due Process Issue Decided in *Hardwick* Does not Decide the Equal Protection Issue.

In *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), the Court decided that homosexual sodomy is not so "deeply rooted in this Nation's history and tradition" that it falls within the zone of personal privacy protected by the due process clause. That conclusion, however, does not automatically answer the question whether classifications based on sexual orientation deserve heightened scrutiny.

The Due Process Clause has been interpreted "largely (though not exclusively) to protect traditional practices against short-run departures." *See* Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988). Thus, "the Due Process Clause often looks backwards: it is highly relevant to the Due Process issue whether an existing or time-honored convention . . . is violated by the practice under attack." *Id.*

The Equal Protection Clause, by contrast, has been "understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply ingrained and longstanding." *Id.* Thus, the Equal Protection Clause "looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure." *Id.*

The fact that these two clauses "operate along different tracks," *id.*, explains why the court's decision in *Hardwick* that homosexual sodomy is not a protected activity under the Due Process Clause says nothing conclusively about whether classifications based on sexual orientation deserve heightened scrutiny. It is "perfectly consistent" to say that homosexual sodomy is not rooted in the traditions of the country, and thus is not a protected activity under the Due Process Clause, but to acknowledge, at the same time, that the history of "invidious discrimination" against gay people warrants heightened scrutiny for classifications based on sexual orientation. *Watkins v. U.S. Army*, 875 F.2d 699, 719 (9th Cir. 1989) (Norris, J., concurring).

The different purposes of the two clauses also explains why it is immaterial to an equal protection analysis whether a classification burdens a group whose members engage in some conduct that is otherwise prohibited by the state. For example, assume arguendo, that homosexual sodomy is a fundamental activity for homosexuals as a group. *But see infra* Part B. The fact that the right to engage in such sodomy is not protected under the Due Process Clause does not inevitably mean that governmental discrimination against homosexuals as a *group* should not be subject to heightened scrutiny.

An analogy to religion may be illuminating. Setting aside the First Amendment, one could imagine the Court concluding that smoking peyote or sacrificing animals are not activities protected by the Due Process Clause and that such activities may be criminalized by the state. Engaging in such activities may, indeed, be fundamental to particular religious groups. The fact that some of the fundamental activities of a particular religious

group may be criminalized, however, does not inevitably mean that state classifications that burden the religious *group* as a whole would not be subject to strict scrutiny.

B. Sodomy Does Not Define The Class Of Homosexuals.

Apart from that fact that the substantive due process issue decided in *Hardwick* does not decide the equal protection issue, the decisions of the lower courts suffer from a second, more basic faulty premise. These courts based their reasoning on an equation of homosexuality with acts of homosexual sodomy. For example, in *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987), the court reasoned that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause . . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." *See also Woodward v. United States;* 871 F.2d 1068, 1076 & n.10 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (same); *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (same); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, No. 94-3855, 1995 U.S. App. LEXIS 10462, at *16 (6th Cir. May 12, 1995) (same).

While all of these courts assert that the "conduct that defines the class" of homosexuals may be criminalized, none of the courts explain why oral or anal

sex (which is the actual conduct that is criminalized in most states) "defines" the class of homosexuals. Indeed, statistics derived over the years from studies of sexual behavior belie that assertion. These studies indicate that heterosexuals engage in oral sex at a rate of approximately 75-80%, with the highest rates present among well-educated, non-minority heterosexuals.[5] Even assuming, arguendo, that 90% of homosexuals engage in oral or anal sex, it is hard to understand how this small difference can mean that sodomy (oral or anal sex) defines the class of homosexuals, but not the class of heterosexuals.

Logically, what defines the class of homosexuals or heterosexuals is *not* the act of engaging in oral or anal sex -- since both homosexuals and heterosexuals engage in those acts in large numbers. Rather, what defines the class is the *gender* of one's partner. *See* Hunter, *Life after Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 550-51 (1992). This is the case whether two people engage in sodomy (oral or anal sex), which is criminalized in approximately half of the states regardless of the gender of the partner with whom one performs the act[6], or whether they engage

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[5] *See* R. Michael, J. Gagnon, E. Laumann, G. Kolata, *Sex in America* 140-41 (1994). Previous studies have reported even higher rates of oral sex. *See, e.g.*, P. Blumstein & P. Schwartz, *American Couples: Money, Work, Sex* 236, 242 (1983) (reporting that more than 90% of heterosexual men and women engage in oral or anal sex); S. Hite, *The Hite Report on Male Sexuality* 1121 (1981) (approximately 96% of men surveyed had performed oral sex on a female partner); and C. Tavris & S. Sass, *The Redbook Report on Female Sexuality* 163 (1977) (85% of women surveyed had performed oral sex on their male partners; 20% had engaged in anal sex.)

[6] Twenty-three states still have sodomy laws on the books. Seventeen of those states apply regardless of the gender of the person with whom sodomy is performed. Six states have laws which prohibit sodomy only

in genital manipulation, kissing, hugging, caressing or simple love -- activities which are generally not criminalized in any state regardless of the gender of the partner.[7]

Thus, sodomy per se is not what is "fundamental to [the] nature" of homosexuals." *See Watkins v. U.S. Army*, 847 F.2d 1329, 1357 (1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989). Rather, what is fundamental to the nature of homosexuals, and what makes them different from heterosexuals, is that they desire a sexual and emotional attachment to a person of the same gender, rather than the opposite gender. In light of this fact, the lower courts were unwarranted in concluding that *Hardwick* logically precludes the possibility that classifications drawn on the basis of sexual orientation deserve heightened scrutiny.

CONCLUSION

If this Court addresses the issue of the level of scrutiny to be accorded governmental classifications based on sexual orientation, it should find that such classifications warrant strict scrutiny.

Respectfully submitted,

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between persons of the same gender. *See* Sherman, *Love Speech*, Stan. L. Rev. 661, 698 (1995) (compiling 22 sodomy statutes, not including that of Texas).

[7] One state, Montana, explicitly criminalizes genital manipulation. MONT. CODE. ANN. § 45-5-505 (1994).

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APPENDIX

APPENDIX A

THE HUMAN RIGHTS CAMPAIGN FUND (HRCF), the nation's largest lesbian and gay political organization, works to end discrimination, secure equal rights, and protect the health and safety of all Americans. HRCF lobbies the federal government on gay, lesbian and AIDS issues; educates the general public; participates in election campaigns; organizes volunteers; and provides expertise and training at the state and local level.

THE NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF) is a 35,000 member civil rights organization dedicated to building a movement to promote freedom and full equality for lesbians and gay men. NGLTF organizes to support the enactment of civil rights legislation and conducts conferences, studies and programs directed at eradicating bias, discrimination and violence against lesbians and gay men. NGLTF therefore has a vital interest in the ability of lesbians and gay men to participate fully in the political process, which is impaired by initiatives such as that passed in Colorado.

THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION (NLGLA) was founded in 1988 as a national association of lawyers, judges, and other legal professionals, law students and affiliated lesbian and gay legal organizations. Its mission is to promote justice within the legal profession for lesbians and gay men in all their diversity. NLGLA has been an affiliate of the American Bar Association since August 1992. It has participated as *amicus curiae* in numerous state

and federal court actions involving or implicating the rights of lesbians and gay men.

THE NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR) is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer *amicus* assistance to this Court in this matter as NCLR attorneys have a litigation history which demonstrates a strong commitment to securing the civil rights of lesbians and gay men. NCLF participated as *amicus* before this Court in *Harley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, et. al.* NCLR attorneys have litigated numerous cases in appellate and trial courts where the rights of lesbians and gay men are threatened.

GAY AND LESBIAN ADVOCATES & DEFENDERS (GLAD) is a non-profit public interest law firm which represents gay men, lesbians, and persons with HIV disease in impact litigation throughout New England. GLAD has participated as counsel or as *amicus curiae* in many cases in both the state and federal courts in which the constitutional rights of lesbian and gay individuals was at issue. Thus, GLAD is well qualified to appear as *amicus curiae* before this Court.

THE GAY AND LESBIAN MEDICAL ASSOCIATION is an organization of more than 1,600 lesbian, gay, bisexual and transgendered physicians, medical students and their supporters from 48 states and 7 Canadian provinces. The organization is dedicated to combatting homophobia within the medical

profession and in society at large, as well as promoting research and delivery of the best possible health care for lesbian, gay, bisexual and transgendered patients. GLMA has an interest in ensuring the fundamental right to participate in the political process and in equal protection.

THE UNION OF AMERICAN HEBREW CONGREGATIONS is a religious and educational organization founded in 1873 and dedicated to the principle of Reform Judaism. The UAHC adopted a resolution in 1977 calling for the end of discrimination on the basis of sexual orientation and has been a consistent supporter of the rights of gay men and lesbians for freedom and dignity. The President of the UAHC, Rabbi Alexander Schindler, has publicly noted the obligation of Jews to remember their history in this regard: "We who were *marranos* in Madrid, who clung to the closet of assimilation and conversion in order to live without molestation . . . cannot deny the demand for gay and lesbian viability."

THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM is a nonprofit nonpartisan organization whose mission is to advance and to protect the legal and civil rights of Asian Pacific Americans through litigation, education, policy development and advocacy. The Consortium is affiliated with the Asian American Legal Defense and Education Fund in New York, the Asian Law Caucus in San Francisco and the Asian Pacific American Legal Center of Southern California. The Consortium joins this brief because it opposes discrimination based on sexual orientation, as well as race, gender, ethnicity, national origin, disability and age.

THE NATIONAL ORGANIZATION FOR WOMEN (NOW) is the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 650 chapters in all 50 states and the District of Columbia. Since 1968, a major goal of NOW has been to ensure fair and equal treatment for, and an end to discrimination against lesbians and gay men. In furtherance of that goal, NOW has participated in numerous legal cases and in drafting related legislation. NOW has a strong interest in ensuring that there is heightened judicial scrutiny in all cases involving discrimination or differential treatment of lesbians and gay men.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) is a leading national non-profit civil rights organization that provides a broad range of legal and educational services in support of women's efforts to eliminate gender-based discrimination. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF opposes Issue 3 because it jeopardizes the ability of any group that suffers discrimination to obtain civil rights protection.

THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. (CWEALF) is a non-profit women's rights organization incorporated in 1973. CWEALF's mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF joins this brief as *amicus curiae* because we are committed to protecting all women's rights, including the rights of lesbians.

THE GAY AND LESBIAN LAW ASSOCIATION OF FLORIDA (GALLA), a voluntary bar association of the Florida Bar, was organized to promote and protect the rights of hundreds of gay and lesbian lawyers in South Florida. The movant is familiar with the customs, practices, sociological and psychological studies, regulations, and laws regarding sexual orientation. GALLA has appeared as a respondent commenting party before the Florida Supreme Court in *In re: Advisory Opinion to the Attorney General -- Restricting Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) and in *The Florida Bar Re: Amendment to Rules Regulating the Florida Bar*, 624 So. 2d 720 (Fla. 1993), and before the same court as an *amicus* in *Cox v. Health and Rehabilitative Services*, 1995 WL 242399 (Fla. 1995).

BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF) is a minority bar association founded in 1980, with a membership of more than 500 lesbians, gay men and bisexuals in the legal community. The purposes of BALIF are: 1) to provide a forum for the exchange of ideas and information of concern to lesbians, gay men and bisexuals in the legal community; 2) to discuss and take action on questions of law and the administration of justice as they affect the lesbian, gay and bisexual community; 3) to encourage and support the appointment of lesbian, gay and bisexual attorneys to the judiciary, public agencies and commissions throughout the Bay Area; and 4) to promote the building of coalitions with other legal organizations to combat all forms of discrimination.

LAWYERS FOR HUMAN RIGHTS - THE LESBIAN AND GAY BAR ASSOCIATION OF LOS ANGELES (LHR) is a

mutual support network for lesbian, gay and bisexual lawyers, law students and legal workers in the Los Angeles area. Its mission is, in exercising its strength as a bar association, to provide a strong leadership presence of and for lesbian, gay and bisexual persons in the legal profession and in the community at large through social functions, education, legal advocacy and participation in political and civic activities. As a minority bar association, it is committed to the advancement of civil rights and does so through a variety of means, including the submission of *amicus* briefs in cases important to the lesbian, gay and bisexual community.

ORANGE COUNTY LAWYERS FOR EQUALITY GAY AND LESBIAN (OC-LEGAL) provides a forum and network for lawyers, judges, legal assistants, law students, law professors and others in law-related fields to help end discrimination and to secure the human and civil rights -- guaranteed to all citizens by the U.S. Constitution -- of lesbian and gay people; to educate lesbian and gay people about their rights; and to educate the community at large about the legal rights of gay men and lesbians.

THE OREGON GAY AND LESBIAN LAW ASSOCIATION (OGALLA) is a group of lesbian, gay and bisexual lawyers, judges, legal workers, law students and others who support the purposes of the organization. OGALLA's primary purposes are to promote the fair and just treatment of all people under law regardless of sexual orientation and to educate the public, the legal profession, and the lesbian, gay and bisexual community about legal issues facing the community.

THE TOM HOMANN BAR ASSOCIATION OF SAN DIEGO (THLA) is San Diego's lesbian/gay/bisexual law association. THLA was founded in 1991 by local attorneys and now has more than 140 members. It welcomes lawyers, judges, legal assistants, law students, law professors and other individuals in law-related fields (regardless of sexual orientation). THLA seeks to provide a forum and network for individuals in law-related fields who are interested in helping to secure the human and civil rights of lesbian, gay and bisexual people.

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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

Roy ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF AMICUS CURIAE OF JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE PRESBYTERIAN CHURCH (U.S.A.) GENERAL ASSEMBLY SUPPORTS BASIC CIVIL LIBERTIES FOR HOMOSEXUAL PERSONS	3
II. AMENDMENT 2 VIOLATES THE UNITED STATES CONSTITUTION	7
A. THE EQUAL PROTECTION CLAUSE	7
B. THE ESTABLISHMENT CLAUSE	11
III. THE MAJORITY MAY NOT DENY A PARTICULAR MINORITY AN EFFECTIVE VOICE	14
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) ..7, 9, 10, 15

Evans v. Romer, 854 P.2d 1270 (Colo. 1993) ..... *passim*

Equality Foundation v. City of Cincinnati, 1995 U.S. App. LEXIS 10462 (6th Cir. 1995) 7

Gray v. Sanders, 372 U.S. 368 (1963) 10

Hunter v. Erickson, 393 U.S 385 (1969) 8

Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 16

Lemon v. Kurtzman, 403 U.S. 602 (1971) 11, 12

Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 15

United States v. Ballard, 322 U.S. 78 (1943) 13-14

Washington v. Seattle School District, 458 U.S. 457 (1982) 8-9

CONSTITUTIONS

U. S. Const., amend. I, Establishment Clause .. 2, 11, 14

U. S. Const., amend. XIV, Equal Protection Clause 2, 7, 8

Colorado Const., Art. 2, Sec. 30, Amendment 2 ..... *passim*

STATUTE

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb 13, 14

TABLE OF AUTHORITIES – Continued

Page

PRESBYTERIAN CHURCH (U.S.A.) SOURCES

Book of Order, Presbyterian Church (U.S.A.) 1993-1994 G-1.0400 15

Hanover Presbytery's Memorial to the Virginia Legislature (Oct. 7, 1776) 14

Minutes of the 205th General Assembly, Presbyterian Church (U.S.A.) (1993) Part I, at 118-119 ..... 1-2, 6

Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.) (1987) Part I, at 776 6

Minutes of the 195th General Assembly, Presbyterian Church (U.S.A.) (1983) Part I, at 152-53 15

Minutes of the 119th General Assembly, Presbyterian Church in the United States, (1979) Part I, at 208 5

Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A. (1978) Part I, at 264, 265 .. 4, 5, 11

STATEMENT OF INTEREST OF THE AMICUS CURIAE

James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Since 1977, General Assemblies of the Presbyterian Church (U.S.A.) have stood firmly in support of equal rights for homosexual persons under the law. These statements include a call for just treatment of homosexual persons in regard to their civil liberties, for civil rights in housing, employment, and public accommodations, and vigilance against laws that discriminate against persons on the basis of sexual orientation. In 1993, the 205th General Assembly of the Presbyterian Church (U.S.A.)

"unequivocally condemn[ed] all discriminatory legislation, such as is exemplified by Article 2, Section 30 (Amendment 2) of the Colorado Constitution. . . . "

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case in the Brief of Respondents.

SUMMARY OF THE ARGUMENT

Since 1977, General Assemblies of the Presbyterian Church (U.S.A.) have opposed discrimination against homosexual persons with regard to their basic civil liberties. The same General Assemblies which have declared the practice of homosexuality is sin have also declared that federal, state, and local legislation which discriminates on the basis of sexual orientation must be vigorously opposed. Amendment 2 is such legislation.

Amendment 2 violates the United States Constitution because it violates the Equal Protection Clause of the Fourteenth Amendment which guarantees the fundamental right to participate equally in the political process to all citizens. In addition, Amendment 2 violates the Establishment Clause of the First Amendment; it is the exclusive province of religious institutions to determine what is sinful and immoral conduct, and the State must not entangle itself in such decisions.

The majority may not deny a particular minority an effective voice. Through its predecessor bodies, the Presbyterian Church (U.S.A.) predates the United States of America. General Assemblies of the Presbyterian Church (U.S.A.) have met annually in the United States since 1789. Through its polity, the Presbyterian Church has always strived to ensure the rights of the minority are protected from the tyranny of the majority. The minority rights of voice and access are guaranteed within the Presbyterian Church by its historic principles which are articulated in its constitution. No less should be expected from the civil government.

ARGUMENT

I. THE PRESBYTERIAN CHURCH (U.S.A.) GENERAL ASSEMBLY SUPPORTS BASIC CIVIL LIBERTIES FOR HOMOSEXUAL PERSONS

On November 3, 1992, a majority of voters in the State of Colorado approved a measure known as Amendment 2, which was an amendment to the State's constitution. The text read as follows:

> **No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.** Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or

> class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The effect of this amendment is to deprive homosexual persons of equal access to government and the benefits and protections government may confer. In light of Amendment 2's heavy burden upon homosexual persons' civil liberties, it is vital that this Court know of this *Amicus'* support of equal rights laws. The Presbyterian Church (U.S.A.) and its predecessor churches[1] have firmly and consistently recognized and supported Biblical principles of justice and equity for all persons, including homosexual persons, as demonstrated by Jesus who welcomed and loved all.

The Presbyterian Church (U.S.A.) disapproves of homosexual behavior, particularly with respect to ordained officers of the Church, and has declared that "homosexuality is not God's wish for humanity."[2] The General Assembly has declared that "the practice of

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[1] The Presbyterian Church (U.S.A.) was formed in 1983 upon the reunion of the two largest Presbyterian churches in the United States: the Presbyterian Church in the United States and the United Presbyterian Church, U.S.A. The General Assembly is the highest governing body in the Presbyterian Church. Predecessor General Assemblies have met in what is now the United States since 1789. Citations to General Assembly statements in this brief use the names of the former churches. Upon reunion in 1983, it was determined the General Assembly statements of the merging churches would continue in force as statements of the Presbyterian Church (U.S.A.).

[2] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 264.

homosexuality is sin."[3] Nevertheless, these same pronouncements call for such activity to be treated as matters of private conduct protected from governmental intrusion. The Presbyterian Church has consistently sought to reserve such matters for moral and theological dialogues. Beginning in 1977, predecessor bodies of the Presbyterian Church (U.S.A.) have called upon their members and civil government to ensure the civil liberties and equal rights of homosexual persons:

> *Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation* and to initiate and support federal, state, or local legislation that prohibits discrimination against persons on the basis of sexual orientation in employment, housing, and public accommodations.[4]

> The 117th and 118th General Assemblies asserted *"the need for the church to stand for just treatment of homosexual persons in our society in regard to their civil liberties, equal rights and protection under the law from social and economic discrimination, which is due all its citizens."*[5]

The 199th General Assembly of the Presbyterian Church (U.S.A.) called for the elimination "of laws governing the private sexual behavior between consenting

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[3] *Id.*

[4] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 265 (emphasis added).

[5] *Minutes of the 119th General Assembly, Presbyterian Church in the United States* (1979) Part I, at 208 (emphasis added).

adults" and the passage "of laws forbidding discrimination based on sexual orientation in employment, housing, and public accommodation. . . . "[6]

In 1993, the 205th General Assembly of the Presbyterian Church (U.S.A.) specifically addressed Amendment 2:

> Whereas, the state of Colorado passed a state constitutional amendment on November 3, 1992, which abrogates all laws that protect people against discrimination on the basis of sexual orientation; and
>
> Whereas, this incident is the first time ever a state constitution has been amended to prevent antidiscrimination laws protecting a particular class of people; and
>
> Whereas, political action groups in various states are using the successful passage of Amendment 2 in Colorado as a model for discriminatory laws, therefore, be it
>
> *Resolved*, That the 205th General Assembly (1993) unequivocally condemns all discriminatory legislation, such as is exemplified by Article 2, Section 30 (Amendment 2) of the Colorado Constitution.[7]

The Presbyterian Church (U.S.A.) calls upon this Court to consider the moral, ethical, and religious ramifications of this discriminatory amendment to Colorado's

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[6] *Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.)* (1987) Part I, at 776.

[7] *Minutes of the 205th General Assembly, Presbyterian Church (U.S.A.)* (1993) Part I, at 118-119.

constitution. The Church's theology and the General Assembly policy statements cited above move it to oppose legislation such as Amendment 2.

II. AMENDMENT 2 VIOLATES THE UNITED STATES CONSTITUTION

A. THE EQUAL PROTECTION CLAUSE

In both its preliminary injunction ruling, *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*"Evans I"*), and its permanent injunction ruling, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*"Evans II"*), the Supreme Court of Colorado noted that Amendment 2 violates the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and Amendment 2 violates that right. *See contra Equality Foundation v. City of Cincinnati*, 1995 U.S. App. LEXIS 10462 (6th Cir. 1995).

As noted by the Colorado Supreme Court, Amendment 2 did not merely "withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination [against homosexuals] and removes its redress from consideration by normal processes." *Evans I*, 854 P.2d at 1285. Enforcement of Amendment 2 would mean that gay men and lesbians are left out of the political process and denied an effective voice in governmental affairs. "[N]ormal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them." *Id.*

Government cannot target a particular group of citizens for selective treatment or exclusion from the political process. "[T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.* at 1282 (footnote omitted). This is not a new constitutional principle arising from judicial consideration of anti-homosexual initiatives. The principle of equal access to government is fundamental to the American political process and has been recognized and championed by the United States Constitution and the United States Supreme Court.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a city charter amendment passed by a majority of the voters in Akron, Ohio. That amendment prohibited the city council from implementing any ordinance dealing with racial, ancestral, or religious discrimination in housing without the approval of a majority of Akron voters. The *Hunter* Court ruled that the state may "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393 (citations omitted) *quoted in Evans I* , 854 P.2d at 1279. Likewise, in *Washington v. Seattle School District*, 458 U.S. 457 (1982), this Court overturned a statewide initiative which prohibited the use of busing to achieve integration. The Fourteenth Amendment reaches a political structure that distorts governmental processes in such a way as to

place particular burdens on the ability of minority groups to achieve beneficial legislation. *Id.* at 467 *cited with approval in Evans I*, 854 P.2d at 1280.

As in Akron, Ohio and the State of Washington, the majority of the electorate in Colorado identified a small, unpopular group of citizens, *Evans II*, 882 P.2d at 1346 ("societal message condemning gay men, lesbians, and bisexuals as immoral") for an especial burden – a burden of separation from government and any benefits it could provide:

> The "ultimate effect" of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures. In the absence of such a constitutional amendment, any governmental entity would be acting contrary to the state constitution by "adopting, enacting, or enforcing" any such measure.

Thus, the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the

electorate through the adoption of a constitutional amendment.

Evans I, 854 P.2d at 1285 (footnote omitted).

Amendment 2 strikes at the heart of the right to participate equally in the political process. Prior to Amendment 2, homosexual Coloradans and their supporters were free to lobby state and local government for protection from discrimination on the basis of their sexual orientation. *Evans II*, 854 P.2d at 1286. As with other groups seeking other goals, the homosexual community could appeal to government officials and administrators. This process, of course, is fundamental to the American governmental system. It plays out across our nation each day – on the local, state, and federal levels.

Amendment 2, however, changes the means by which homosexual citizens may petition their government. For this particular group, the doors to all government offices are closed. Instead, to secure any statute, ordinance, rule, or policy whatsoever, they must first pass an amendment repealing or changing Amendment 2. Moreover, they must secure such an amendment from the very voters who adopted Amendment 2. To obtain even the most basic benefit from their government, these citizens must put their request to the very majority that deprived them of governmental access in the first place. "Such a structuring of the political process undoubtedly is contrary to the notion that '[t]he concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.' " *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) *quoted in Evans I*, 854 P.2d at 1285.

As the 1978 General Assembly prophetically stated, "Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation. . . . There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence. . . . "[8] Today, over 15 years later, the General Assembly continues to call for basic civil rights for homosexual persons.

B. THE ESTABLISHMENT CLAUSE

Governmental regulation of the activities of the community occasionally involves certain points of contact between governments and religious organizations. These points of contact, by themselves, are not prohibited under the Constitution. *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "Fire inspections, building and zoning regulation, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts." *Id.* At times, however, governmental institutions may unnecessarily entangle themselves in questions of a primarily religious character with no proper secular purpose. When a governmental entity pursues legislation lacking in secular purpose, whose principal or primary effect advances religion or a particular religious point of view, and which fosters "an excessive government entanglement with religion," such legislation violates the

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[8] *Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A.* (1978) Part I, at 265.

Establishment Clause under the test formulated by this Court in *Lemon*.

The issue of homosexuality in society and the propriety of homosexual activity is one of the most divisive issues within the American religious community today. Religious bodies now manifest a spectrum of response to homosexuality ranging from total acceptance to virulent denunciation. An ideal example of these widely varying religious views are the various religious *amicus curiae* briefs before this Court.[9] To the extent that the State of Colorado's Amendment 2 excludes and punishes homosexual persons, the State impermissibly entangles itself in this theological debate continuing among and within religious bodies. The State of Colorado must abstain totally from this religious debate.

Indeed, in their own brief in support of the State, Petitioners' Religious *Amici* acknowledge that the morality of homosexuality is

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[9] On the one hand, *Amici* Christian Life Commission of the Southern Baptist Convention, Lutheran Church – Missouri Synod, and the National Association of Evangelicals support Amendment 2 based upon their religious and theological understandings. On the other hand, *Amici* American Friends Service Committee, American Jewish Committee, Federation of Reconstructionist Congregations and Havurot, The Most Reverend Edmond L. Browning, Presiding Bishop of the Episcopal Church, Reconstructionist Rabbinical Association, Unitarian Universalist Association, United Church of Christ Office for Church in Society, and United Synagogue of Conservative Judaism oppose Amendment 2 based upon their theological understandings and responsibility to provide moral guidance to the community. *See also Respondents' Religious Amici Curiae Brief.*

> the subject of impassioned discussion within religious denominations, local churches, the religious social-service sector, and other ecclesial organizations such as seminaries and religious universities. Theologians, clerics, and laypersons all participate in the debate, and on both sides. Because it confronts religious belief and church autonomy, homosexual practice is a matter which the First Amendment ensures that the confessional communities may work out for themselves and in their own time.[10]

Ironically, after acknowledging the debate and stating that each religious community must work out its position in its own time, Petitioners' Religious *Amici* fully embrace and endorse the State's interference through its adoption of Amendment 2.

Not content with the freedom to exercise religion guaranteed by local exemptions, by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, and by the First Amendment, Petitioners' Religious *Amici* strike far beyond the principle of free exercise and employ the power of the State to enforce their morality in the society at large. In so doing, they seek to breach the wall of separation between church and state and apply their own moral precepts with the force of civil law. Government must not intervene to settle what are moral, religious, and theological controversies. This Court warned about governmental intrusion into religious disputes in *United States v. Ballard*:

> The Fathers of the Constitution were not unaware of the varied and extreme views of

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[10] *Petitioners' Religious Amici Curiae Brief* at 3-4.

> religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

322 U.S. 78, 87 (1943).

Religious exemptions in local ordinances, the Religious Freedom Restoration Act, and the First Amendment carefully and scrupulously preserve all of the free exercise rights religious bodies are due. To provide even more, as urged by Petitioners' Religious *Amici* and brought to bear by Amendment 2, violates the First Amendment's Establishment Clause. Predating both the United States Constitution and its Bill of Rights, *amicus* Presbyterian Church has stood firm by this guiding principle: "We ask no ecclesiastical establishments for ourselves; neither can we approve of them when granted to others." *Hanover Presbytery's Memorial to the Virginia Legislature* (Oct. 7, 1776). Today, over 200 years later, this basic principle remains true.

III. THE MAJORITY MAY NOT DENY A PARTICULAR MINORITY AN EFFECTIVE VOICE

"Amendment 2 expressly fences out an independently identifiable group." *Evans I*, 854 P.2d at 1285. The effect of Amendment 2 is to allow the majority (those who voted in favor of Amendment 2) to deprive an identifiable minority (homosexual people) of any meaningful input on issues dramatically affecting many

aspects of their lives. This is not constitutionally permissible: " 'A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.' " *Evans II*, 882 P.2d at 1350 (quoting *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-37 (1964)).

Since the inception of Presbyterianism in the United States, the Church's polity has consistently provided for government by elected representatives who recognize that the will of the majority shall prevail, but the rights of the minority shall be protected.[11] In its constitutional expression of Historic Principles the denomination affirmed "the orderly way by which the church handles conflict so that the rights of the minority are protected from the tyranny of the majority and, at the same time, the rights of the majority are protected from [being paralyzed by] the intransigence of a minority."[12]

In the Church's system of polity, as in the secular courts, the rights of the minority are carefully protected within the constitution and by the procedures of the Presbyterian Church (U.S.A.). The minority has "every reasonable right to press their case to try to persuade the majority of the church to their point of view."[13] Presbyterians have long recognized the value of preventing the majority from denying the minority " 'an effective voice

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[11] *Book of Order, Presbyterian Church (U.S.A.)* (1993-1994) G-1.0400. The Book of Order sets out the form of government, directory for worship, and rules of discipline for the Presbyterian Church (U.S.A.).

[12] *Minutes of the 195th General Assembly, Presbyterian Church (U.S.A.)* (1983) Part I, at 152-53.

[13] *Id.* at 156.

in the governmental affairs which substantially affect their lives'." *Evans I*, 854 P.2d at 1277 (citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969)).

Allowing the implementation of Amendment 2 will permit the majority of citizens to deny a specific minority (homosexual persons) an effective voice in government and will foreclose legislative redress for them. Amendment 2 will thus have far-reaching effect on virtually every aspect of the lives of a special group of citizens. Such a denial of access to the political process and fencing-out is contrary to the fundamental values of justice and fairness so long and highly-valued by the citizens of these United States. We call upon this Court to prevent this amendment from effectively depriving a particular group of persons of the rights due all citizens.

CONCLUSION

The Colorado Supreme Court's ruling carefully preserves for all the citizens of Colorado the equal protection of the law. For the foregoing reasons, the ruling of the Colorado Supreme Court should be affirmed.

Respectfully Submitted,

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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado and The STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF AMICI CURIAE OF THE AMERICAN FRIENDS SERVICE COMMITTEE, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT, INTERFAITH IMPACT FOR JUSTICE AND PEACE, THE MOST REVEREND EDMOND L. BROWNING, PRESIDING BISHOP OF THE EPISCOPAL CHURCH, RECONSTRUCTIONIST RABINNICAL ASSOCIATION, UNITARIAN UNIVERSALIST ASSOCIATION, UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY, AND UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. AMENDMENT 2 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 2

A. Amendment 2's Purpose And Effect Are To Endorse A Particular Religious Belief Concerning Homosexuality, Thereby Excluding Gay Persons And Religious Dissenters From The Political Community. Such Endorsement Violates The Establishment Clause 5

B. Amendment 2 Also Violates The Establishment Clause By Attempting To Use Coercive State Powers To Discriminate Against Gay Citizens In Aid Of Particular Religious Beliefs 12

II. THE FREE EXERCISE OF RELIGION CANNOT BE GUARANTEED BY A LAW THAT ITSELF ESTABLISHES RELIGION 17

A. Amendment 2 Exceeds The Permissible Scope Of State Accommodation 18

B. Amendment 2 Is Not A Neutral Law In That It Encourages Discrimination 22

C. The Religious Freedom Restoration Act Preserves Religious Liberty By Balancing Free Exercise Against The Competing Needs Of Secular Society 26

CONCLUSION 29

STATEMENTS OF INTEREST A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Abington School District v. Schempp, 374 U.S. 203 (1963) 6, 7

Allah v. Beyer, 1994 WL 549614 (D.N.J. Mar. 29, 1994) 28

Baker v. Bosworth, 222 P.2d 416 (Colo. 1950) 23

Bessard v. California Community Colleges, 867 F. Supp. 1454 (E.D. Cal. 1994) 28

Bob Jones University v. United States, 461 U.S. 574 (1983) 22

Bowen v. Kendrick, 487 U.S. 589 (1988) 10, 20

Bowen v. Roy, 476 U.S. 693 (1986) 20

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993) 9

Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991) 23

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 4

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) 26

County of Allegheny v. A.C.L.U., Greater Pittsburgh Chapter, 492 U.S. 573 (1989) ..... *passim*

Edwards v. Aguillard, 482 U.S. 578 (1987) 7

Employment Division v. Smith, 494 U.S. 872 (1990) 11, 14, 28

Engel v. Vitale, 370 U.S. 421 (1962) 12, 15

TABLE OF AUTHORITIES – Continued

Page(s)

Epperson v. Arkansas, 393 U.S. 97 (1968) 6, 7, 8, 19

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 19

Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993) 5

Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) 5, 26

Everson v. Board of Education, 330 U.S. 1 (1947) 13

Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *appeal docketed*, Nos. 50306 & 50308 (5th Cir. May 11, 1995) 28

Gillette v. United States, 401 U.S. 437 (1971) 3, 6

Joseph Burstyn, Inc v. Wilson, 343 U.S. 495 (1952) 19

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 10

Larson v. Valente, 456 U.S. 228 (1982) 5

Lee v. Weisman, 112 S. Ct. 2649 (1992) 4, 6, 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) 7, 9

Lynch v. Donnelly, 465 U.S. 668 (1984) 9, 11

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 20

Norwood v. Harrison, 413 U.S. 455 (1973) 22

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58 (2d Cir. 1953) 19

Palmore v. Sidoti, 466 U.S. 429 (1984) 22

Reitman v. Mulkey, 387 U.S. 369 (1967) 23, 24, 25

Sherbert v. Verner, 374 U.S. 398 (1963) 26

TABLE OF AUTHORITIES – Continued

Page(s)

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 6, 9, 15, 19

Wallace v. Jaffree, 472 U.S. 38 (1985) .. 7, 8, 9, 12, 15, 17

Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 14

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 15, 30

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 26

Yenter v. Baker, 248 P.2d 311 (Colo. 1952).....19, 23

STATUTES

COLO. CONST. Art. II, § 30b..... *passim*

The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. 1994) 27, 29

MISCELLANEOUS

CATECHISM OF THE CATHOLIC CHURCH (Doubleday 1994)..... 21

CHURCH AND SOCIETY: SOCIAL POLICY OF THE EPISCOPAL CHURCH..... 21

General Convention (Episcopal Church) 1994 (C-019s)..... 21

GEORGE L. MOSSE, NATIONALISM AND SEXUALITY, (1985)..... 16

GEORGE L. MOSSE, TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM (1985 ed.) 16

HEINZ HEGLER, THE MEN WITH THE PINK TRIANGLE (1980)..... 16

TABLE OF AUTHORITIES – Continued

Page(s)

Tenth General Synod, United Church of Christ, Resolution 6 (1975)..... 21

Warren Johansson & William A. Percy, *Homosexuals in Germany*, 7 SIMON WIESENTHAL CENTER ANNUAL (1990)..... 16

Ruediger Lautmann, *Gay Prisoners in Concentration Camps as Compared with Jehovah's Witnesses and Political Prisoners, in* A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS (Michael Berenbaum ed., 1990)..... 16

FRANK RECTOR, THE NAZI EXTERMINATION OF HOMOSEXUALS (1981) 17

SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (5th ed.) 7

WRITINGS OF JAMES MADISON (Hunt ed., 1904) 25

SUMMARY OF ARGUMENT

I.

As evidenced by the State's brief, the purpose and effect of Amendment 2 is to endorse its proponents' religious views concerning homosexual persons.[1] Amendment 2's proponents' avowed religious belief that homosexual persons should be singled out for discrimination is not a universal religious belief and, in fact, is contrary to the religious beliefs of Respondents' Religious *Amici*. As this Court has long held, the government must remain neutral in matters of religious theory, doctrine and practice. Amendment 2 is not neutral because it encourages private discrimination in support of a particular religious belief to the detriment of contrary religious beliefs and because it obligates the State to act only in furtherance of Amendment 2's religious, discriminatory purpose. Because Amendment 2 constitutes State endorsement of one set of religious beliefs over all others, it violates the First Amendment's Establishment Clause.

II.

America's founding generation had a vision of a society in which religion would be entirely voluntary and entirely free. People of all faiths were to be welcome to openly exercise their differing religious beliefs. Thus, the religious beliefs of Amendment 2's sponsors should be accommodated where possible. Amendment 2, however, goes beyond accommodation because it constitutionalizes

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[1] Throughout this brief, the term "homosexual" and/or "gay" refers to those individuals singled out for discrimination by Amendment 2: homosexual, lesbian, and bisexual citizens.

the private biases of Amendment 2's sponsors at the expense of homosexual citizens and of Respondents' Religious *Amici*, and because it directly involves the State in furthering such religious views.

The State's argument that Amendment 2 is necessary to protect religious liberty is meritless. Existing jurisprudence, as well as the existence of the Religious Freedom Restoration Act ("RFRA") and express exemptions in some anti-discrimination laws for religiously-held beliefs, demonstrate that there is a way to protect the religious freedom of Amendment 2's sponsors without either promoting discrimination or inhibiting the religious freedom of others who do not share the views of Amendment 2's sponsors. Religious liberty for all citizens of Colorado would be hindered, not advanced, by Amendment 2.

ARGUMENT

I. AMENDMENT 2 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The State of Colorado admits in its brief that the purpose and effect of Amendment 2[2] is to "promote free exercise values" and to protect "core religious values." Petitioners' Brief at 45. These values, according to the State, include the right of persons "who have sincere and profound religious objections to homosexuality" to discriminate against gay persons in housing, jobs, and public accommodations. *Id.* at 44. The State and Petitioners'

[2] Amendment 2 was codified at Article II, § 30b of the Colorado Constitution.

Religious *Amici*[3] who share these religious beliefs argue that Amendment 2 is a permissible "accommodation" of these individuals' free exercise rights as well as the rights to autonomy of like-minded religious institutions. *Id.* at 43-45.

Petitioners' Religious *Amici* emphasize that according to their beliefs, "[r]eligion, at least orthodox and traditional religions, generally deny [gay persons] moral legitimacy. This places religion foursquare in [the] path" of the efforts of gay persons to protect their civil rights through enactment of anti-discrimination laws. Brief of Christian Legal Society *et al.* (hereafter "CLS") at 25. These *Amici* clearly recognize that "religious persons and religious groups – and hence free exercise and institutional autonomy – are not a mere side issue in this case." *Id.*

However, the State's admission that Amendment 2 is intended to "promote free exercise values" and to protect "core religious values" by itself implicates Amendment 2 under the Establishment Clause of the First Amendment. Whenever a State law "touches upon religion," it must be carefully scrutinized to determine if it is "permissible under the Establishment Clause." *County of Allegheny v. A.C.L.U., Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989); *see Gillette v. United States*, 401 U.S. 437, 450 (1971).

The Establishment Clause is as important for protection of religious liberty as the Free Exercise Clause of the First Amendment. This Court has recognized that "the

[3] Petitioners' Religious *Amici* include the parties joined in the Brief *Amicus Curiae* filed herein by the Christian Legal Society.

principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause," *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992), "and that it may often not be possible to promote the former without offending the latter." *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 788 (1973). Among the limitations on religious accommodation which the Establishment Clause imposes is that "government may not promote or affiliate itself with any religious doctrine or organization[.]" *Allegheny County*, 492 U.S. at 590.

Neither the State nor Petitioners' Religious *Amici*, in their respective Briefs, make any attempt to demonstrate that Amendment 2 conforms to the Establishment Clause's limitations. However, Respondents' Religious *Amici* here contend that Amendment 2, both in its purpose and effect, amounts to an impermissible State endorsement of the religious beliefs and practices of the Amendment's proponents and discriminates against the opposing religious beliefs of others, including Respondents' Religious *Amici*. Also, Amendment 2's authorization of discrimination in aid of its proponents' proselytizing mission aimed at gay individuals – however unlikely to succeed – constitutes indirect coercion to adhere to a particular religious belief.

For these reasons, Amendment 2's religious purpose and effect exceed the permissible boundaries of State accommodation under the Free Exercise Clause and constitute an infringement on the religious liberty protected by the Establishment Clause.[4] Accordingly, the "religious

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[4] The Respondents in this case (Plaintiffs in the trial court) challenged Amendment 2 on several grounds including "that it violates the constitutional prohibition against establishment of religion." *Evans v. Romer*, 854 P.2d 1270, 1272 n.2 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993) ("*Evans v. Romer I*").

In holding that Amendment 2 "is not the least restrictive means of ensuring religious liberty, and is not narrowly tailored to serve the compelling governmental interest in ensuring the free exercise of religion," *Evans v. Romer*, 882 P.2d 1335, 1343 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) ("*Evans v. Romer II*"), the Colorado Supreme Court applied the same "strict scrutiny" analysis required for "denominational preferences" under the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982).

Respondents' Religious *Amici* submit that in addition to, and independent of, the Equal Protection issues before this Court, this Court can and should affirm the Colorado Supreme Court's decision on Establishment Clause grounds.

values" relied on by the State to justify Amendment 2 cannot serve as a legitimate State interest to uphold its constitutionality.

A. Amendment 2's Purpose And Effect Are To Endorse A Particular Religious Belief Concerning Homosexuality, Thereby Excluding Gay Persons And Religious Dissenters From The Political Community. Such Endorsement Violates The Establishment Clause.

> In proscribing all laws "respecting an establishment of religion," the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs . . . . It is part of our settled jurisprudence that "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion . . . or to favor the adherents of any sect or religious organization."

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-9 (1989) (plurality opinion) (quoting *Gillette v. United States*, 401 U.S. at 450); cited with approval in *Allegheny County*, 492 U.S. at 593.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968), this Court set forth the doctrine of neutrality with respect to religion and religious belief required by the Establishment Clause:

> Government in our democracy, state and national, *must be neutral in matters of religious theory, doctrine, and practice.* It may not be hostile to any religion or to the advocacy of no religion; *and it may not aid, foster or promote one religion or religious theory against another or even against the militant opposite.*

Id. at 103-04 (emphasis added); *accord Allegheny County*, 492 U.S. at 590; *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) (neutrality prohibits placing official support behind "the tenets of one or of all orthodoxies").[5]

In this case, the State admits that Amendment 2 is motivated by the religious views on homosexuality of the Amendment's proponents. The primary proponent of Amendment 2, Colorado for Family Values (CFV), sought passage of the Amendment for the expressed purpose of permitting those who share CFV's religious objections to

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[5] Moreover, this Court has made it clear that the Free Exercise Clause's prohibition against State action which denies "the rights of free exercise to *anyone* . . . has never meant that a majority could use the machinery of the State to practice its beliefs," *Schempp*, 374 U.S. at 226, or "to enforce a religious orthodoxy." *Lee v. Weisman*, 112 S. Ct. at 2658.

homosexuality to engage in unrestricted discrimination against homosexual persons.[6]

CFV conceived of the alleged need for and drafted the language of Amendment 2. CFV also managed the campaign which ultimately resulted in passage of Amendment 2 (v. 16, pp. 874, 1045-46). CFV's position papers on Amendment 2 state its religious basis for promoting passage of that Amendment: "Gay behavior is what the Bible calls 'sin' because sin defines any attempt to solve human problems or meet human needs without regard to God's wisdom and solutions as found in Scripture and in His saving grace and mercy." (Pl. Ex. 12 at 67; v. 3, p. 56.)[7]

In *Schempp*, this Court articulated two of the three tests which were later summarized in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971):[8]

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[6] The religious goals of the proponents of legislation are relevant in determining whether the contested measure has a religious purpose and/or effect which violates the Establishment Clause. *See Edwards v. Aguillard*, 482 U.S. 578, 591-93, 601-02 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56-57, 74-76 (1985) (history of a law is a factor in determining whether its purpose and effect are religious); *Epperson v. Arkansas*, 393 U.S. at 108, n.16-17 (1968) (advertisement by proponents for statute adopted by popular initiative cited as evidence of the law's religious purpose); SUTHERLAND, STAT. CONST. § 48.19 (5th ed.).

[7] *See* Statement of Interest of the Lutheran Church-Missouri Synod: "God's Word clearly identifies homophile behavior as immoral, and condemns it. . . . " Brief of CLS at App. 4.

[8] Under the *Lemon* analysis, "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Allegheny County*, 492 U.S. at 592.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

374 U.S. at 222; *accord Epperson v. Arkansas*, 393 U.S. at 107.

In *Allegheny County*, this Court noted that decisions subsequent to *Lemon* had "refined the definition of governmental action that unconstitutionally advances religion" by paying "[p]articularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Allegheny County*, 492 U.S. at 592. A majority of this Court in *Allegheny County* further emphasized that:

> The prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*."

Id. at 593 (emphasis in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70) (O'Connor, J., concurring).

Of particular relevance to this case, this Court summarized the "essential principle" expressed in its use of key words such as "endorsement," "favoritism," or "promotion":

> The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Allegheny County, 492 U.S. at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *accord Texas Monthly, Inc. v. Bullock*, 489 U.S. at 9 (plurality opinion); *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring).[9]

The admitted religious purpose of Amendment 2, to facilitate the ability of individuals and organizations with religious objections to homosexuality to enforce their beliefs throughout Colorado society and in State governmental operations, clearly constitutes an "appearance" that the State has taken a position on this question of religious belief.[10]

It is equally certain that if Amendment 2 is enforced, it will have the primary effect intended by its

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[9] Justice O'Connor, in her concurring opinion in *Lynch*, explained one of the reasons for this principle: "Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 688.

[10] The purpose test of *Lemon* does not require that a State law have exclusively secular objectives. However, the secular purposes proffered by the State must be sincere, not shams. *Wallace v. Jaffree*, 472 U.S. at 64; *see Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 2226-29 (1993). This Brief does not address the validity of the secular purposes alleged by the State to justify Amendment 2's discriminatory purpose. If none of them are valid, then Amendment 2's religious purpose fails the first prong of the *Lemon* test. If this Court finds a valid secular as well as religious purpose behind Amendment 2, it must still determine whether its effect is to endorse religion. *Allegheny County*, 492 U.S. at 592.

"pervasively sectarian" proponents.[11] *See Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988). Amendment 2's conscious employment of a prohibition against protecting gay citizens from discrimination, as a means of facilitating the Amendment's proponents' religious purpose, creates the "appearance of a joint exercise of legislative authority by Church and State [which] provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982). Under such circumstances, Amendment 2 "can be seen as having a 'primary' and 'principal' effect of advancing religion." *Id.* at 126.

Additionally, by creating a constitutionally protected right to discriminate against them, Amendment 2 subjects gay persons to second class citizenship in Colorado society. Because they do not adhere to CFV's religious beliefs on homosexuality, Colorado's gay residents face discrimination in housing, jobs or public accommodations and are precluded by Amendment 2 from seeking any form of protection from any branch or level of state government.

Thus, the second aspect of the essential principles behind the "endorsement" test under the Establishment Clause, "making adherence to a religion relevant in any way to a person's standing in the political community," is also compromised by Amendment 2. *Allegheny County*,

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[11] At a church discussion on Amendment 2 prior to its passage Kevin Tebedo, the co-founder of CFV, asserted that Amendment 2 is "about authority. It's about whose authority takes precedence in the society in which we live. Is it the authority of man . . . or is it the authority of God?" (v. 16, pp. 1060, 1061-62.)

492 U.S. at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. at 687).[12]

Finally, by siding with its proponents' religious view on homosexuality, Amendment 2 discriminates against other, equally sincere and profound religious beliefs, including those of Respondent's Religious *Amici*,[13] which oppose discrimination against gay citizens. Justice Scalia, writing for the majority in *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), recognized that under the First Amendment Religion Clauses, "[t]he government may not . . . lend its power to one or the other side in controversies over religious . . . dogma." As this Court stated unequivocally in *Allegheny County*:

> The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.

492 U.S. at 611. Contrary to the State's assertions on this issue, instead of promoting and protecting religious liberty, Amendment 2 has the opposite impact.

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[12] By CFV's definition, homosexual individuals are "sinners" whose beliefs are at odds with those religions, such as Petitioners' Religious *Amici's*, which "generally deny them moral legitimacy." Brief of CLS at 25. Though many gay persons may be practicing Christians or adherents to other religious disciplines, as well as participants in religious organizations which do not share CFV's interpretation of religious scripture, unless they conform to CFV's religious views, they are "non-adherents" of the religious beliefs favored by Amendment 2.

[13] *See* Respondents' Religious *Amici's* Statements of Interest at Appendix.

As this Court eloquently articulated in *Lee v. Weisman*:

> The explanation lies in the lessons of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

112 S. Ct. at 2658. By endorsing, through Amendment 2, a particular religious belief on homosexuality, "the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Id.*

Therefore, because Amendment 2's primary purpose and effect are to endorse a particular religious belief, because it makes adherence to that belief relevant to the standing of gay citizens in the Colorado political community, and because it discriminates against opposing religious beliefs, Amendment 2 violates the Establishment Clause.

B. Amendment 2 Also Violates The Establishment Clause By Attempting to Use Coercive State Powers To Discriminate Against Gay Citizens In Aid Of Particular Religious Beliefs.

The Establishment Clause also forbids the State from using its power or prestige to either directly or indirectly pressure or coerce a person to conform to the prevailing, officially approved religious doctrine. *Wallace v. Jaffree*, 472 U.S. at 50; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962),

Everson v. Board of Educ., 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

CFV's religious motives for seeking passage of Amendment 2 were not limited to protecting the private religious beliefs of individuals opposed to homosexuality. Nor were they confined to preserving the autonomy of religious organizations whose theology requires discrimination against homosexuals in the internal affairs of those organizations. CFV also sought adoption of Amendment 2 to accomplish its main objective: to proselytize its belief that homosexuality can be "cured" through religious "conversion" to heterosexual orientation.[14] (Pl. Ex. 12 at 67-68.)

In CFV's view, civil rights protections for gay citizens inhibit CFV's ability to religiously assist them to convert to heterosexuality "through the power of Christ." (Pl. Ex. 12 at 68.) Amendment 2, by prohibiting state protection for gay citizens against discrimination, removes this crucial "impediment" to CFV's proselytizing activities.

It cannot seriously be contended that sexual orientation is freely and voluntarily changeable.[15] Accordingly,

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[14] During the campaign to pass Amendment 2, CFV Executive Board Chairman Will Perkins sent a letter to 4,000 Colorado pastors enlisting their help and the help of their congregations in passing Amendment 2. In his letter, Perkins asserted that CFV's leadership on Amendment 2 was aimed at stopping gay citizens' efforts to protect themselves from discrimination through civil rights legislation so that "churches" could continue "to minister to homosexuals as persons living in sin with Christ as the Source of forgiveness and the Restorer of hope for relationship with God." (v. 15, pp. 758-59.)

[15] See testimony of Respondents' experts (v. 6, p. 94; v. 13, pp. 272-73, 383; v. 14, p. 469). It is conceivable, however, that

the attempt to coerce homosexual individuals into becoming heterosexuals through a state policy which protects and promotes discrimination against homosexual individuals is grossly perverse. More importantly, the Constitution prohibits the enforcement of a law which was drafted and promoted to aid in such sectarian "pressure" whether or not ultimately successful in the application. *See Westside Community Schools v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring). The primary effect of such a law would be for gay citizens to experience discrimination because of their non-conformance with CFV's religious beliefs.

Such coercive pressure, whether or not successful, violates the principle that the government cannot "impose special disabilities on the basis of religious views or religious status." *Employment Div. v. Smith*, 494 U.S. at 877. In his famous "Memorial and Remonstrance Against Religious Assessments," James Madison articulated the reasons for his objections to a Virginia law which would have imposed a tax to support teachers of Christianity. Madison stated that laws establishing religion:

> degrade from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be . . . from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

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some individuals will appear to religiously renounce their homosexuality to avoid the punishing discrimination they would otherwise experience.

quoted in *Engel*, 370 U.S. at 432 n.16. Amendment 2 violates the core Establishment Clause principle that government:

> may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Texas Monthly, Inc., 489 U.S. at 9 (plurality opinion).

This principle, of prohibiting government sponsored compulsion in the area of freedom of conscience and religion, is fortified by "the teaching of history," both preceding and subsequent to the adoption of the Bill of Rights. *Wallace v. Jaffree*, 472 U.S. at 54 n.39. As Justice Jackson explained in *West Virginia State Board of Education v. Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon, but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, *and particular plans for saving souls*. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure towards unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such

effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. . . . [16]

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[16] This year, as America and the other countries involved in World War II struggle to comprehend the lessons of that era and the Nazi Holocaust which defined it, CFV, in its April 1995 Newsletter, has contributed a piece of revisionist history. In its lead article, "The Pink Swastika," CFV propagates the perspective that "Homosexuality actually played a key role in the psychology of Nazi brutality. In fact, 'macho' homosexuality inspired the ruthlessness of the entire regime." CFV Report: The Voice of Amendment 2, Volume 27, page 1, April 1995.

CFV's use of a classic revisionist technique – literally blaming the victims for their own persecution – is consistent with CFV's attempt to demonize and dehumanize gay people in an effort to justify Amendment 2's unbridled discrimination against them. *See generally*, Pl. Ex. 12 at 8-30, 46-47. For a discussion on the use of similar stereotypes in racist theory, *see generally* GEORGE L. MOSSE, NATIONALISM AND SEXUALITY (1985); GEORGE L. MOSSE, TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM (1985 ed.).

CFV's article deliberately distorts responsible historical research which reveals Hitler's "bloody purge" of homosexual individuals in the SA storm troopers, the Nazis' official policy and campaign against homosexual individuals, the convictions of 50,000 gay people under anti-homosexual laws during the Nazi-era, and the harsh treatment of gay individuals in Nazi concentration camps, including attempts to forcibly "cure" homosexual persons of their sexual orientation. *See* HEINZ HEGLER, THE MEN WITH THE PINK TRIANGLE (1980); Warren Johansson & William A. Percy, *Homosexuals in Germany*, 7 SIMON WIESENTHAL CENTER ANNUAL (1990); Ruediger Lautmann, *Gay Prisoners in Concentration Camps as Compared with Jehovah's Witnesses and Political Prisoners, in* A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS (Michael Berenbaum ed., 1990); FRANK RECTOR, THE NAZI EXTERMINATION OF HOMOSEXUALS (1981).

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

319 U.S. 624, 640-41 (1943) (emphasis added) (*quoted in substantial part in Wallace v. Jaffree*, 472 U.S. at 54 n.39).

The coercive nature of Amendment 2 conflicts with these historical lessons underlying the religious liberty protected by the First Amendment. Because of its coercive nature, Amendment 2 violates the Establishment Clause.

II. THE FREE EXERCISE OF RELIGION CANNOT BE GUARANTEED BY A LAW THAT ITSELF ESTABLISHES RELIGION.

It is clear that what the sponsors and supporters of Amendment 2 seek is the elimination of any compromise between their religious views and any other interest, including the religious beliefs of others. The Christian Legal Society's statement of interest set forth in their brief *amicus curiae* is revealing on this point:

> Because the source of religious liberty . . . is the Creator, not a constitutional amendment, statute or executive order, *it is not merely one of many policy interests to be weighed against others* . . . . Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law . . . . "

CLS Brief at App. 2 (emphasis added).

The State and its Religious *Amici* therefore ask this Court to permanently tip the balance in favor of the

sponsors' religious views so that no other interest can possibly outweigh those views: "the compelling government interest in protecting [our] religious liberty *justifies any burden* Amendment 2 imposes upon [homosexual individuals]." *Id.* at 2 n.2 (emphasis added); *see also id.* at 26 (same). The State and its Religious *Amici* ignore the fact that other constitutionally protected religious views are at odds with the views promoted by Amendment 2. This endorsement of one set of religious beliefs over others is precisely contrary to what the Framers contemplated when drafting the First Amendment.

A. Amendment 2 Exceeds The Permissible Scope Of State Accommodation.

The proponents of Amendment 2 seek to justify the need for Amendment 2 on the basis of perceived difficulties with hypothetical free exercise claims that they believe they would have to assert in order to avoid Colorado's existing anti-discrimination laws and policies. The issue before this Court, however, is not whether any of Colorado's statutes, ordinances or policies which prohibit discrimination on the basis of sexual orientation violate religious freedom as protected by the Free Exercise Clause of the First Amendment. That issue must await an actual case or controversy before it can properly be adjudicated.

The issue here is whether Amendment 2, by withdrawing all of Colorado's authority to protect gay citizens from discrimination in all walks of life – public, private, secular and sectarian – exceeds the permissible scope of State accommodation of free exercise of religion and thereby violates the Establishment Clause.

" 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (quoting Judge Learned Hand *in Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

Thus, Amendment 2, which not only "exempts" its religious proponents from having to comply with anti-discrimination laws but also repeals all such anti-discrimination laws to the extent they protect gay people, imposes substantial burdens on gay persons and on those with contrary religious views. Amendment 2 exposes gay people to discrimination from anyone, not just those with religious motives, and requires the State to act only in furtherance of Amendment 2's discriminatory purposes. *See Yenter v. Baker*, 248 P.2d 311, 314 (Colo. 1952). Because Amendment 2 allows the imposition of substantial burdens, especially upon gay citizens, in furtherance of its proponents' avowed religious beliefs, it exceeds the limits of permissible accommodation. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

"[T]he State has no legitimate interest in protecting any and all religions from views distasteful to them. . . ." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (*quoted with approval in Epperson v. Arkansas*, 393 U.S. 97, 107 (1968)). While CFV's and Petitioners' Religious *Amici*'s religious belief that homosexual orientation is objectionable is protected by the Free Exercise Clause, they cannot employ the authority of the State of Colorado to carry out that belief.

Furthermore, this Court has never "interpreted the First Amendment to require the government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free

Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (emphasis in original); *accord Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Amendment 2 would repeal numerous laws and regulations of the State of Colorado relating solely to governmental actors and employees, to the extent such laws and regulations protect gay people from discrimination. Among them are an Executive Order of the Governor, No. D0035 (Dec. 10, 1990), prohibiting discrimination on the basis of sexual orientation in State employment practices and Canon 3(a)(9) of the Code of Judicial Conduct prohibiting judicial prejudice or bias based on sexual orientation. Clearly, in this context, Amendment 2 exceeds the permissible scope of accommodation under the Free Exercise Clause.

The State's Religious *Amici*'s espoused religious beliefs regarding the treatment of homosexual persons are not universal. For example, The Episcopal Church, also a Christian denomination, has a longstanding policy to work toward the eradication of discrimination against homosexual persons in society.[17] The other religious denominations and associations

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[17] In 1976, the General Convention of the Episcopal Church (the Church's highest policy making body) adopted the following resolutions:

> *RESOLVED*, the House of Bishops concurring, that it is the sense of this General Convention that homosexual persons are children of God who have the full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.
>
> *RESOLVED*, the House of Bishops concurring, that this General Convention expresses its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and calls upon our society to see that such protection is provided in actuality.

CHURCH AND SOCIETY: SOCIAL POLICY OF THE EPISCOPAL CHURCH at 357.

In 1994, the General Convention reaffirmed the above resolution regarding equal protection for homosexual persons and committed the resources of the Church to work on behalf of legislation to assure such protection. General Convention 1994 (C-019s) at 60.

[18] For example, the Roman Catholic Church, while not approving homosexual acts, teaches tolerance toward those who are homosexual: homosexual persons "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided." CATECHISM OF THE CATHOLIC CHURCH at 625-26 (Doubleday 1994). Still other religions have adopted resolutions opposing discrimination against homosexual persons and exhorting adherents to work for the enactment of legislation that would guarantee the liberties of all persons without discrimination related to sexual orientation. *See, e.g.*, Tenth General Synod, United Church of Christ, Resolution 6 (1975). Thus, CFV and the other sponsors of Amendment 2 cannot and do not speak for all religions on the issue of homosexuality.

comprising Respondents' Religious *Amici* espouse similar policies against discrimination. *See, e.g.*, Appendix (Respondents' Amici's Statements of Interest). Amendment 2, while it may serve the self-defined ends of CFV and its other sponsors, is contrary to, and undermines, the beliefs of other Christian and non-Christian religions,[18] and the beliefs of Respondents' Religious *Amici*.

The method employed by Amendment 2 to accommodate religious beliefs, namely, discrimination against gay individuals not restricted to the sectarian sphere, is not a legitimate governmental interest. "The Constitution cannot

control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) ("[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause.")

As this Court said in *Allegheny County*:

> To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. *The anti-discrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.*

492 U.S. 573, 611 (1989) (emphasis added); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (denial of tax exempt status to schools that engage in racial discrimination on the basis of sincerely held religious beliefs does not violate Free Exercise Clause).

B. Amendment 2 Is Not A Neutral Law In That It Encourages Discrimination.

The State contends that because Amendment 2 does not *require* discrimination against homosexual citizens, it is not discriminatory, but rather is neutral. Petitioners' Brief at 48. However, Amendment 2 does encourage discrimination because it would open the door to discrimination against homosexual citizens by anyone for any reason or for no

reason. It *prohibits* Colorado (and its courts) from taking any action to defend homosexual citizens against discrimination and, as a self-executing initiative, limits Colorado to undertaking only those future actions which would *further* the discriminatory purpose of Amendment 2.

As the Colorado Supreme Court stated in *Yenter v. Baker*, a self-executing law is:

> beyond the power of the legislature to render it nugatory by passing restrictive laws. . . . "Only such legislation is permissible as is in furtherance of the purpose, or as will facilitate the enforcement, of such provision, and legislation which will impair, limit or destroy rights granted by the provision is not permissible."

248 P.2d at 314 (quoting *Baker v. Bosworth*, 222 P.2d 416, 418 (Colo. 1950)). Accordingly, Amendment 2 locks the State of Colorado into a posture of promoting prospective discrimination.

Thus, Amendment 2, contrary to the State's claim of neutrality, is far from neutral in that it supports and encourages discrimination both by private individuals and by the State. *See Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 658 (Cal. Ct. App. 1991). This Court addressed the seeming "neutrality" of a similar State constitutional amendment in *Reitman v. Mulkey*, 387 U.S. 369 (1967). There, the Court invalidated a California constitutional amendment (known as § 26), passed by ballot initiative, which had the effect of repealing existing laws prohibiting racial discrimination in housing.[19]

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[19] Section 26 provided, in part, that:
Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or

Although the anti-discrimination laws at issue in *Reitman* addressed racial discrimination, the Court's test of the subject law's neutrality, or lack thereof, is unaffected by the form of discrimination at issue. The Court found that the initiative was discriminatory, despite the fact that it did not, by its own terms, *require* discrimination. By overturning existing State laws protecting citizens against discrimination, the initiative had changed the situation from one in which discriminatory practices were restricted to one where they were affirmatively encouraged:

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377.

Unlike Amendment 2, § 26 specifically exempted the State from its purview. Even with such an exemption, the Court found that § 26 impermissibly co-opted the State into a position of encouraging discrimination. *Id. A fortiori*, Amendment 2, which does not exempt the State of Colorado from its purview but rather mandates that the State act to further

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> indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Reitman, 387 U.S. at 371 n.2 (setting forth the full text of § 26).

the purposes of the amendment, must certainly fail the neutrality analysis.

Amendment 2 does not simply attempt to defend a particular group's religious beliefs. Instead, it creates a special right for that group (and anyone else) to discriminate against another targeted group of citizens they do not like. By making unavailable to gay citizens the means of redress available to all other vicitms of discrimination, a uniquely protected category would be created for discrimination against gay citizens in both the private and government sectors of society.

The State and its Religious *Amici* assert that such a right is necessary for religious reasons and that Amendment 2 should be respected because it is the will of the people. Petitioners' Brief at 14. As Justice Douglas reiterated in *Reitman*:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . .

387 U.S. at 387 (1966) (Douglas, J., concurring) (quoting 5 WRITINGS OF JAMES MADISON 272 (Hunt ed., 1904) (emphasis in original)).

Allowing for the enactment of anti-discrimination laws while providing for limited exemptions for religious beliefs would certainly constitute a more neutral arrangement than

Amendment 2 would create.[20] As the Colorado Supreme Court noted in its ruling, the State did not argue that the Denver ordinance, which contains an exemption for religiously-based objections, impairs religious freedom. *Evans v. Romer II*, 882 P.2d 1335, 1343 (Colo. 1994). In fact, the State's own expert witness testified that imposing a religiously-based exemption on all such anti-discrimination laws would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty. *Id.* This Court, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), has already recognized the value of religiously-based exemptions in protecting religious liberty under federal anti-discrimination laws. *Id.* at 339.

The State's "winner take all" approach to religious liberty is not neutral and cannot long exist in a democracy as diverse as ours without straining it to the point of breaking. A law that is truly neutral would be one that accommodates conflicting religious beliefs with minimal harm to the rights of other members of society.

C. The Religious Freedom Restoration Act Preserves Religious Liberty By Balancing Free Exercise Against The Competing Needs Of Secular Society.

In 1993, Congress codified the standards established in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*,

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[20] Respondents' Religious *Amici* recognize that the issue of religiously-based exemptions is not before the Court, but simply point out that Amendment 2, because it disallows any anti-discrimination laws as they apply to gay citizens, would have a much broader discriminatory effect than would allowing for religiously-based exemptions.

406 U.S. 205 (1972), by enacting the Religious Freedom Restoration Act of 1993. 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. 1994). Under the RFRA test, government must justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.[21]

RFRA was intended to protect the religious liberty of all citizens without imposing any one group's religious beliefs on others or requiring the State to support or advance any particular religious views.

RFRA renders meritless the State's argument that Amendment 2 is necessary to protect religious liberty. RFRA, as well as existing jurisprudence and express exemptions set forth in some of the targeted anti-discrimination laws, already provides the necessary protection. RFRA allows the supporters of Amendment 2 to seek an exemption from any of the anti-discrimination laws targeted by the amendment based upon their religiously-held belief against homosexuality.

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[21] Section 3 of RFRA provides as follows:

(a) IN GENERAL – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) EXCEPTION – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000bb-1(a), 1(b) (Supp. 1994).

The impact of RFRA on this Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the free exercise analysis of *Sherbert* may not be applicable to neutral laws of general applicability, has yet to be fully determined. Since the enactment of RFRA, however, the vast majority of cases dealing with free exercise claims have been determined by applying the balancing test as set forth in RFRA.[22] It is also important to note, even though the issue is not directly before the Court today, that regardless of whether a court hearing a challenge to one of the anti-discrimination laws targeted by Amendment 2 applies the RFRA/*Sherbert* balancing test or relies upon this Court's ruling in *Smith*, the most favorable ruling the challenger could receive would be for the court to hold that the challenger is exempted from compliance with the subject ordinance.[23]

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[22] *See, e.g., Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994) (forcing plaintiffs to choose between being denied employment or taking a statutory loyalty oath in violation of their religious beliefs imposed a substantial burden on the plaintiffs' exercise of their religion and such oath was not the least restrictive means of furthering a compelling state interest). *Allah v. Beyer*, 1994 WL 549614 (D.N.J. Mar. 29, 1994) (unpublished opinion) (transfer of an inmate to a prison where he would not be able to share religious experiences with co-religionists constituted a substantial burden on the inmate's exercise of his religion, but such transfer constituted the least restrictive means available to prison administrators to accomplish the compelling state interest of maintaining institutional security and order). Only one federal district court has held RFRA to be unconstitutional, arguing that Congress violated the doctrine of Separation of Powers by intruding on the power and duty of the judiciary. *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995), *appeal docketed*, Nos. 50306 & 50308 (5th Cir. May 11, 1995).

[23] Respondents' Religious *Amici* are not necessarily endorsing such a ruling but simply note that the possibility for such a ruling exists.

Unlike Amendment 2, RFRA also recognizes that the protection of free exercise of religion cannot exceed the limits of the Establishment Clause. Section 7 of RFRA reads, in part, as follows:

> Nothing in this Chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion.

42 U.S.C. § 2000bb-4 (Supp. 1994). The sponsors of RFRA, unlike the sponsors of Amendment 2, recognized that the Establishment Clause is essential to preserve religious liberty for all citizens, rather than just a chosen few.

Amendment 2, if upheld, would preclude the judicial scrutiny of religious motives and competing State interests that free exercise challenges under RFRA would require. Further, Amendment 2 would fail to provide the Establishment Clause protections of RFRA. Rather than protecting free exercise, Amendment 2 would endanger the religious liberty of all citizens.

CONCLUSION

The Free Exercise Clause alone cannot sufficiently safeguard religious liberty. The Establishment Clause also plays a central role in guaranteeing such freedom by forbidding official actions that signify state endorsement or exclusion based on an individual's religious beliefs. If, as the proponents of Amendment 2 contend, it is religiously necessary for them to discriminate against homosexuals, then they may seek a religious exemption from non-discrimination laws. *See, e.g.*, RFRA. The State may not, however, without running afoul of the Establishment Clause, give selected religious

beliefs the force of law. To allow such a law threatens the religious liberties of those with contrary religious views, as well as the liberties of all Americans. As this Court stated in *West Virginia Board of Education v. Barnette*:

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

319 U.S. 624, 641-42 (1943).

Therefore, for the foregoing reasons, the Court should affirm the ruling of the Colorado Supreme Court that Amendment 2 is unconstitutional.

Respectfully submitted,

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STATEMENTS OF INTEREST

The **AMERICAN FRIENDS SERVICE COMMITTEE** ("AFSC") is an institutional expression of the principles of the Religious Society of Friends (Quakers). AFSC's belief in the sanctity and worth of each human being calls it to engage in a struggle – though never a war, for no person is our enemy – for greater justice for all people, greater inclusiveness in communities and institutions. The AFSC has a long history of action against discrimination, whether based on race, gender, disability, religion, national origin or legal status. Over the past two decades, AFSC has also come to understand the need to work toward removing practices of discrimination against lesbian, gay and bisexual persons. As part of that struggle AFSC supports legal protections against discrimination in employment and employment related benefits, housing, public accommodations, education and other areas of life, including domestic partnerships.

The AFSC has affirmed its respect and loving concern for its lesbian, gay and bisexual committee and staff members. It has initiated actions to implement this concern through staffing policies and program activities designed to raise awareness in the larger community of the problems of discrimination based on sexual orientation, recognizing that such discrimination harms both its direct victims and the community as a whole.

The **AMERICAN JEWISH COMMITTEE** ("AJC") is a national membership organization founded in 1906, a time of pogroms in Europe and rising anti-Semitism in America, to protect the civil and religious rights of Jews. The AJC has chapters throughout the United States,

including Colorado. The AJC believes that civil and religious rights can be made secure for Jews only if the rights of all Americans are equally secure. Therefore, AJC has been actively involved since the early 1930s in the cause of civil rights.

As an extension of AJC's firm opposition to invidious discrimination based on race, religion, sex, and national origin, AJC is also opposed to discrimination based on sexual orientation in employment, housing, education and public accommodations.

The **ANTI-DEFAMATION LEAGUE** ("ADL") is one of the oldest civil rights organizations in the United States. It was founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups, and religions. As set forth in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For more than eighty years, ADL has been active in the fight against discrimination in employment, housing, education and public accommodations.

The **FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT** ("FRCH") is the congregational arm of the Jewish Reconstructionist Movement, representing 80 affiliated groups and 50,000 members in North America.

FRCH is on record as having adopted a policy favoring full and equal participation in Jewish and civic life for all gay and lesbian Jews. The Reconstructionist Movement believes that all people are created in the image of God and that the sanctified love between two people is a

right to be enjoyed by everyone in society regardless of the sexual orientation of the parties. Therefore, FRCH endorses the principle of protection for the full and complete rights of all gay and lesbian persons.

The **INTERFAITH IMPACT FOR JUSTICE AND PEACE** ("IIJP") is a 26-year old coalition of Protestant, Catholic, Jewish and Muslim organizations working together on public policy. The 35 faith groups represent national denominations and regional, state and local organizations. The IIJP has a long-standing history of speaking out against discrimination in employment, housing, education and public accommodations. It has actively supported civil rights for gay, lesbian and bisexual individuals. The IIJP has worked at both the national and state levels to ensure the full protection of the law and inclusion in society of gay, lesbian and bisexual individuals. The membership of the IIJP reflects this commitment. From its national member organizations to its individual members to its staff IIJP is an inclusive organization that does not discriminate based on race, gender, disability, religion, sexual orientation, national origin or legal status. IIJP believes that discrimination based on sexual orientation hurts the individuals directly affected and harms the whole of our society.

The **MOST REVEREND EDMOND L. BROWNING, PRESIDING BISHOP OF THE EPISCOPAL CHURCH.** The Episcopal Church is a hierarchical Christian denomination, and a province of the worldwide Anglican Communion that is geographically divided into nearly 120 dioceses in the United States and several nations abroad. Each such diocese is headed by a bishop and contains a number of worshiping congregations, each generally with

its own ordained priest. For example, the Diocese of Colorado has as its leader a bishop, and approximately 108 worshiping congregations.

The chief pastor and executive of The Episcopal Church is its Presiding Bishop, who is elected from among the bishops of the dioceses by the Church's General Convention. The current Presiding Bishop, one of the *amici curiae* in this case, is the Most Reverend Edmond L. Browning, formerly the bishop of the Diocese of Hawaii. The Presiding Bishop, among his other pastoral and administrative duties, often speaks for the Church on matters on which the Church has formally taken a policy position or as to which it is appropriate for the Presiding Bishop to take a leadership role.

The Episcopal Church has long adhered to its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and has articulated this position in a series of resolutions adopted by its General Convention, which are cited in this Brief.

The **RECONSTRUCTIONIST RABBINICAL ASSOCIATION** ("RRA") is comprised of over 120 rabbis who are graduates of the Reconstructionist Rabbinical College located in Philadelphia, Pennsylvania. The RRA serves as the professional organization for Reconstructionist Rabbis. The RRA was represented on a joint Reconstructionist Commission that investigated the role of gay and lesbian Jews in the Jewish Community a few years ago. In accordance with its statement in that Commission Report, the RRA affirms the full equality of gay and lesbian people in Jewish social, cultural and religious life. The RRA seeks to prevent discrimination against gay and

lesbian people and to find ways to involve them fully in inclusive and welcoming Reconstructionist Jewish Communities.

The **UNITARIAN UNIVERSALIST ASSOCIATION** is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state, personal religious freedom and the right to privacy. Most relevant to the case at bar is the Association's resolutions (a) opposing discrimination based on sexual orientation or practice and (b) affirming the goal of equality, dignity and respect for all people, regardless of affectional or sexual orientation.

The **UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY** ("UCC") is a national instrumentality of the United Church of Christ, a denomination of approximately 1.5 million members and 6100 churches, including 71 churches in Colorado. Its predecessor agency, the Council for Christian Social Action, in 1969, declared its opposition to all laws criminalizing consensual homosexual expression in private and urged their repeal. It also called for an end to employment discrimination and other forms of discrimination against homosexuals. In 1975, the United Church of Christ General Synod, the denomination's most representative body, passed a pronouncement calling for federal, state, and local legislation to guarantee civil liberties for all and to forbid discrimination related to sexual preference. To quote from the Pronouncement, "Our Christian faith

requires that we respond to the injustice in our society manifested in the denial and violation of the civil liberties of persons whose affectional or sexual preference is toward persons of the same gender." In 1983, the Executive Council recommended that homosexuality, per se, not be a bar to ordination but that Associations should consider a candidate's total view of human sexuality and its moral expression. Since then the UCC, by vote of Associations across the country, has ordained many gay and lesbian persons for Christian ministry.

For over twenty years many parts of the United Church of Christ have been in the forefront in seeking an end to discrimination against gay and lesbian people. UCC clergy and churches in Colorado were vocal in opposition to Amendment 2, with almost 50 UCC clergy signing an ad in opposition in the *Denver Post*. Throughout its diverse history, from the days when religious vision for a new society led the Mayflower Pilgrims to cross the sea in 1620, UCC has consistently believed that when a society attempts to structure itself so as to refuse by law to offer protection to a group of citizens who face discrimination and abuse, the very purpose of civil society has been violated.

The **UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM** ("USCJ"), established in 1913, is the association of 800 Conservative Jewish congregations with two million members in North America.

In November 1991, USCJ adopted a Resolution affirming Judaism's belief that the divine image reflected by every human being must always be cherished and

affirmed; recognizing that Jews have always been sensitive to the impact of official and unofficial prejudice and discrimination, wherever directed; reiterating that, as are all Jews, gay men and lesbians are welcome as members in its affiliated congregations; and supporting full civil equality for gay and lesbian people in national life.

TABLE OF CONTENTS

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

AMENDMENT 2 WAS ADOPTED FOR THE CONSTITUTIONALLY IMPERMISSIBLE PURPOSE OF PREVENTING GAY VOTERS FROM PARTICIPATING EQUALLY IN THE POLITICAL PROCESS 4

A. The Colorado State Courts Found that Amendment 2 Was Adopted for the Purpose of Preventing Gay Voters from Participating Equally in the Political Process. 4

B. The Findings of the Court Below Are Supported by Substantial Evidence. 8

C. The Purpose Found by the Courts below Is Constitutionally Impermissible. 18

D. Amendment 2 Has the Effect of Denying Gay Voters an Equal Opportunity to Participate Effectively in the Political Process. 23

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: *Pages:*

Batson v. Kentucky,
476 U.S. 79 (1986) 2

Brown v. Board of Education,
347 U.S. 483 (1954) 2

Buckley v Valeo,
424 U.S. 1 (1976) 23

Burns v. Richardson,
384 U.S. 73 (1966) 19, 20

Carrington v. Rash,
380 U.S. 89 (1965) ..... *passim*

Cipriano v. Houma,
395 U.S. 701 (1969) 19

Cooper v. Aaron,
358 U.S. 1 (1957) 2

Crawford v. Los Angeles Board of Education,
458 U.S. 527 (1982) 9, 10

Davis v Bandemer,
478 U.S. at 109 ..... 20, 21, 23

Davis v. Mann,
377 U.S. 678 (1964) 20

Dunn v. Blumstein,
405 U.S. 330 (1972) 19

Evans v. Cornman,
398 U.S. 419 (1970) 19

Gaffney v. Cummings,
412 U.S. 735 (1973) 20, 21, 23

Pages:

Garza v. County of Los Angeles,
756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d
763 (9th Cir. 1990), *cert. denied*, 498 U.S.
1028 (1990) 2

Hunter v. Erickson,
393 U.S. 385 (1969) 11

James v. Valtierra,
402 U.S. 137 (1971) 21, 22

Lane v. Wilson,
307 U.S. 268 (1939) 21

Lucas v. Forty-Fourth General Assembly,
377 U.S. 713 (1964) 25

McKennon v. Nashville Banner Publishing Co.,
___ U.S. ___, 115 S. Ct. 879 (1995) 2

Mobile v. Bolden,
446 U.S. 55 (1980) 20

Phillips v. Martin Marietta Co.,
400 U.S. 542 (1971) 2

Reitman v. Mulkey,
387 U.S. 369 (1967) 9, 10

Richardson v. Ramirez,
418 U.S. 24 (1976) 21

Shelley v. Kraemer,
334 U.S. 1 (1948) 2

Smith v. Allwright,
321 U.S. 649 (1944) 2

St. Francis v. Al-Khazraji,
481 U.S. 604 (1987) 2

Valtierra v. James,
313 F. Supp. 1 (N.D. Cal. 1970) 22

Pages:

Washington v. Seattle School Dist. No. 1,
458 U.S. 457 (1982) 10

White v. Regester,
412 U.S. 755 (1975) 2

Constitutional Provisions: *Pages:*

U.S. Const. amend II ..... *passim*

Colo. Const. art. V § 1 24

Colo. Const. art. V § (2) 25

Miscellaneous: *Pages:*

Bureau of the Census, *Public Employment in 1991* (1992) 17

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

No. 94-1093

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, *ET AL.*,
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Interest of Amici

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a public interest law firm founded in 1940, dedicated to combatting bias and securing equal opportunity for all Americans through public education, antidiscrimination legislation and full and effective enforcement of the civil rights laws. LDF has participated

as counsel of record or *amicus curiae* in important cases before this Court involving discrimination on a variety of levels, including race, *Brown v. Board of Education*, 347 U.S. 483 (1954), ethnicity, *St. Francis v. Al-Khazraji*, 481 U.S. 604 (1987), gender, *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971), and age, *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S.Ct. 879 (1995), consistently urging the Court to recognize the real and destructive effects of prejudice. LDF has also participated in a number of cases, such as this one, regarding the scope of the Fourteenth Amendment's protection against subjugation, bias, and arbitrariness. *See e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Cooper v. Aaron*, 358 U.S. 1 (1957); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944).

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national nonprofit organization whose principal objective is to protect and promote the civil rights of Latinos in the United States. It is particularly dedicated to securing such rights in political access, immigration, education, employment, and language rights. MALDEF has litigated many cases in order to ensure equal access to the political process. Among those are *White v. Regester*, 412 U.S. 755 (1975) (invalidating the at-large election scheme for excluding Mexican Americans and African Americans from effective participation in the political process), *Garza v. County of Los Angeles*, 756 F.Supp. 1298, (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (invalidating district boundaries as intentionally discriminatory against Latino voters and diluting Latino voting strength). As a civil rights organization, MALDEF has an interest in ensuring the protection of the most fundamental right to participate in the political process.

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that works at

federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Recognizing that full gender equality cannot be achieved if discrimination on the basis of sexual orientation is permissible, WLDF has participated as *amicus curiae* in major lesbian and gay rights cases and has assumed an active role in efforts to make invidious discrimination on the basis of sexual orientation unlawful.

SUMMARY OF ARGUMENT

Petitioners' brief deals largely with the question of whether the *effect* of Amendment 2, without more, is sufficient to render that provision unconstitutional. The decision of the court below, however, did not rest exclusively on that impact. Rather, the Colorado courts also concluded as a matter of fact that Amendment 2 was framed and enacted for the *purpose* of thwarting equal participation in the political process by gay voters. This finding is fully supported by the record, and virtually compelled by the plain language of Amendment 2. That finding was not made over the objections of petitioners; to the contrary, here, as in *Carrington v. Rash*, 380 U.S. 89 (1965), petitioners insisted below that eviscerating the "factional" political influence of "special interest" gay voters constituted a legitimate reason, indeed a compelling state interest, justifying Amendment 2.

This avowed purpose of Amendment 2, we urge, is constitutionally impermissible. The lower courts' findings as to the purpose of Amendment 2 provide a case-specific basis for affirming the decision below, and render unnecessary a resolution of the broader issue of whether the effect of Amendment 2 would be sufficient itself to render that provision constitutionally infirm.

ARGUMENT

AMENDMENT 2 WAS ADOPTED FOR THE CONSTITUTIONALLY IMPERMISSIBLE PURPOSE OF PREVENTING GAY VOTERS FROM PARTICIPATING EQUALLY IN THE POLITICAL PROCESS

A. The Colorado State Courts Found that Amendment 2 Was Adopted for the Purpose of Preventing Gay Voters from Participating Equally in the Political Process.

In its 1993 decision, the Colorado Supreme Court emphasized that the impact of Amendment 2 on gay voters was deliberate:

> Amendment 2 alters the political process so that a *targeted* class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination ...Amendment 2 *singles out* that class of persons (namely, gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation.

(Pet. App. D-25) (emphasis added).

In 1994 the Colorado Supreme Court reiterated this finding:

> *Evans I*...was based on the fact that Amendment 2 *sought* to deny an independently identifiable group's right to participate equally in the political profess....In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is *intended* to deny the same right to persons based on "homosexual, lesbian, or bisexual... conduct, practices, or relationships...." Amendment 2 *targets* this class of person....(Pet. App. B-22) (emphasis added)[1].

The trial court noted that the petitioners had openly defended Amendment 2 as a measure intended to thwart what they regarded as the pernicious influence of gay voters. Petitioners called as witnesses the leaders of Colorado for Family Values, which had drafted and led the campaign for Amendment 2. Those sponsors insisted that they had acted on the belief that "militant gay aggression in this state...endangers the state's political functions." (Pet. App. C-8).

> Petitioners' witnesses urged that this Amendment protected Colorado's political functions from being overrun by such groups....[T]he founder of CFV...testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone.

(Pet. App. C-6 to C-7).

Petitioners contended in the courts below that gay voters exercised undue influence in the political process. In

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[1] *See also* Pet. App. B-4 ("an attempt to impede the expression of 'a difference of opinion on a controversial political question'"). The dissenting judge below agreed, describing the purpose of Amendment 2 as "prohibiting homosexuals, lesbians and bisexuals from enacting certain legislation." (Pet. App. B-45).

the trial court, petitioners' counsel argued:

> [H]omosexuals...have political power *disproportionately* greater than their numbers....Homosexuals enjoy superior lobbying, clout [and] voting turnout.[2]

In the Colorado Supreme Court, petitioners insisted that the sponsors of Amendment 2 were gravely and legitimately concerned that "the legislature was too vulnerable to the formidable homosexual lobbying power here in Colorado"[3] and that the "homosexual 'movement was going forward' and that local gains were 'just a piece of the puzzle' which would be used as 'leverage to approach state legislators....'"[4] Having adduced evidence intended to substantiate those concerns, petitioners argued below that gays are:

> a politically powerful and relatively privileged special interest....Homosexuals are *immensely powerful* in proportion to their numbers....They enjoy *inordinate* access to influential cultural institutions such as the media and entertainment industries....[H]omosexual advocates have succeeded in dominating the terms of the debate.[5]

Similar objections, of course, have been voiced in the past

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[2] Defendants' Trial Brief, Case Nos. 92 CV 7233, P. 45 and n.55 (emphasis added).

[3] Opening Brief for Defendants-Appellants, Case Nos. 94 SA 048 and 94 SA 128, p.4.

[4] *Id.* at 5.

[5] *Id.* at 30-31 and n.42 (emphasis added).

about the political and cultural influence of other groups of Americans. Petitioners also contended that in Aspen, Boulder and Denver--cities which had passed anti-discrimination ordinances, in Denver and Boulder following public referenda--"homosexuals and bisexuals are a dominant force and wield the greatest political power."[6]

Counsel for petitioners repeatedly pressed in the courts below justifications for Amendment 2 that were entirely consistent with, and indeed more elaborate than the finding of the state courts as to the purpose of the Amendment. Petitioners insisted that one of the objectives "sought" by Amendment 2 was to "preven[t] government from supporting the political objectives of a special interest group,"[7] i.e. gay voters. The Colorado Supreme Court correctly characterized this as an argument which, by branding gay voters as a somehow illegitimate "special interest," sought to justify rigging the political process to deny them an opportunity for effective political participation:

> [D]efendants offer no authority to support the rather remarkable proposition that government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose

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[6] *Id.* at 34; *see also* Tr. 1497 (closing argument for state urging that Amendment 2 will "prevent against stealth campaigns at the local [level] by activists who would like to see sexual orientation in the law").

[7] *Id.* at 42-43; see also Trial Brief for Defendants, Case No. 92 CV 7223, p. 68 ("Amendment 2 prevents government from subsidizing the political objectives of a special interest group."); Brief in Support of Defendants' Motion for Summary Judgment, Case No. 92 CV 7223, p. 17 ("Amendment 2 prevents government from subsidizing the political objectives of a special interest group.").

> of implementing the political objectives of the governed....The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group."

(Pet. App. B-20). Similarly, petitioners argued below that "Amendment 2...seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment Colorado's body politic."[8] The state Supreme Court, though properly recognized that the method of avoiding factionalism sought by Amendment 2 was intentionally to strip gay voters of any practical ability to advance through the political process their interests regarding the issues which the state sought to brand as unduly controversial:

> [W]e fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism."

(Pet. App. B-21).

B. The Findings of the Court Below Are Supported by Substantial Evidence.

Petitioners do not directly take issue with the findings of the lower courts as to the actual purpose of Amendment

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[8] Trial Brief for Defendants, Case No. 92 CV 7223, pp. 60-61; see also Brief in Support of Defendants' Motion for Judgment on the Pleadings, p. 8 ("Amendment 2...seeks to ensure that the deeply divisive issue of homosexuality's place in society does not serve to fragment Colorado's body politic.").

2. Any dispute regarding this fact-bound issue is clearly outside the scope of the Question Presented.

Even if review of that issue had been sought in this Court, there would be no reason to overturn the decision of the Colorado Supreme Court. The purposes animating Amendment 2 are, as petitioners themselves emphasized below, "a quintessentially factual question." (Tr. 96) In *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982), this Court deferred to the conclusions of the California Supreme Court as to the motive behind the state constitutional provision there at issue. 458 U.S. at 544 ("[I]n this case,...involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court."); *see also Reitman v. Mulkey*, 387 U.S. 369 (1967). Here, as in *Crawford* and *Reitman*, the state appellate court was

> "armed...with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate."

Crawford, 458 U.S. at 543, *quoting Reitman*, 387 U.S. at 378.

The findings of the Colorado Supreme Court in this regard are fully supported by the record. The plain language of Amendment 2 is more than sufficient by itself to support, if not require, that finding. As the court below correctly observed, Amendment 2, on its face, is expressly targeted at a "class of persons," which the provision delineates as those individuals whose "orientation, conduct, practices, or relationships" are "homosexual, lesbian, or bisexual." Amendment 2 does not seek to exclude from consideration by state and local government all issues and controversies regarding sexual orientation, but focuses

exclusively on the issue--discrimination *against* homosexuals--which gay voters are particularly likely to press. Far from compelling government neutrality on issues regarding sexual orientation, Amendment 2 leaves the state and localities free to respond with alacrity to the wishes of any voters who favor government-imposed discrimination against gays.

With regard to the city ordinances prohibiting discrimination based on "sexual orientation," Amendment 2 invalidates those local laws only insofar as they apply to "homosexual, lesbian, or bisexual orientation". Thus heterosexuals retain the protection of the Denver, Boulder and Aspen ordinances, and heterosexual voters are free to seek similar protections from the state legislature. In this respect, Amendment 2 is on its face more extreme, for example, than California's 1964 Proposition 14, which applied equally to minority and non-minority voters, and which precluded the state from discriminating against minorities as well as from protecting them.[9] And, unlike the provisions previously considered by this Court, which were narrowly directed at a particular type of activity,[10]

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[9] *See Reitman v. Mulkey*, 387 U.S. 369, 371 (quoting Proposition 14), 391 (dissenting opinion) ("neutral on its face"), 394 ("a neutral provision restoring ...the sphere of free choice"); *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 527 (1982) (upholding provision which addressed racial issue "in neutral fashion"); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 494 (Powell J. dissenting) (1982) ("[T]he State has adopted a policy of racial neutrality in student assignments."), 495 (challenged provision is "neutral on its face, and racially neutral as public policy").

[10] *See. e.g., Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982) (limitation on use of two specific remedies--busing and pupil school assignment--to redress violations of state, but not federal, constitution); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (limiting authority of local school officials, but not state officials or state courts, to utilize busing to integrate schools), 488 (dissenting opinion emphasizing subjects not covered by challenged provision), 490 (same), 496 (same), 497 n.12 (same).

Amendment 2 is broadly framed to encompass the entire gamut of possible government action. Covering such unrelated subjects as employment, housing, public accommodations, and insurance, and applying with full force to discrimination involving no assertion of privacy or religious motivation, Amendment 2 is unintelligible as the solution to any common problem other than the "problem" perceived by the Amendment's proponents of undue gay political influence. The purpose of Amendment 2 is thus even more apparent on its face than the motive which Justice Harlan perceived behind the Akron charter provision in *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (concurring opinion).

Petitioners themselves proffered testimony from the proponents of Amendment 2 in order to establish the purpose of Amendment 2. Petitioners' star witness was Tony Marco, who had drafted Amendment 2 and founded its sponsoring organization, Colorado for Family Values. Counsel for petitioners argued in his opening statement:

> You will...hear from Tony Marco who did much thinking on this issue and was instrumental in drafting Amendment 2 and planning the strategy that led to its electoral success. You will hear from [Marco and other CFV officials] about why they did what they did.

Mr. Marco candidly proclaimed that Amendment 2 was framed to thwart effective use of the political process by gay voters:

> It was necessary because it was obvious that the aggression of gay militants through the

> legislature was not going to cease....[T]he legislature is very vulnerable to all kinds of lobbying...lobbying for which I discovered gay militants were very well equipped and were very well experienced. And so the only way to ensure that this kind of activity would stop would be through passage of a constitutional amendment.[11]

The virtue of Amendment 2, Marco explained, was that it would completely preclude gay voters from advancing through the political process what he perceived to be their common goals. "[We] f[ound] a way to stop this kind of aggression with one single act." (Tr. 837). Amendment 2 was intentionally framed as broadly as possible to prevent enactment of any measures which gay voters might support:

> The fundamental principle behind the drafting of the initiative language was quite simply to take those factors which we felt that gay militants had themselves said that they desired, plus all of the factors that are attendant on achievement of or awarding of

[11] Tr. 839; *id.* at 837 (Amendment 2 framed to thwart the "broad statewide agenda of the militant gay movement."); *see id.* at 846 ("statewide aggression on the part of gay militants"); *see also id.* at 852 ("[W]e felt that the legislature was too vulnerable to the formidable lobbying power of the gay militant contingent here in Colorado."), 859 ("[W]hat we are dealing with in my opinion is one of the most politically powerful organizations relative to the size of its numbers."), 868 ("statewide militant gay aggression"), 869 (There would be "irrational public policy, if gay militants had their way on the State of Colorado.").

> protected class status, and simply say no to those.[12]

Marco explained that it was necessary to prevent gay voters from seeking government protection and assistance because other voters seeking such government resources "simply could not compete with gay militants' ability to lobby, to influence legislation, to promulgate its views through print and through other media." (Tr. 866). As the Colorado courts correctly recognized, Amendment 2 solved this "problem" by intentionally excluding gay voters from participation in that political competition to influence government legislation and policy.

Documentary evidence demonstrated that prior to the passage of Amendment 2 Marco had circulated flyers with similar admonitions that "[r]ecently Colorado homosexual, lesbian and bisexual activists and their supporters have launched a multi-pronged legislative offensive."[13] Marco had asserted that the tactics of these "gay extremists" "shows a striking resemblance to, of all things, a Communist Party directive quoted in the 1956 Report of the House of Representatives Committee on Un-American Activities."[14] Another flyer widely circulated by CFV in support of

[12] Tr. 843; *see also id.* at 853 ("[B]y dealing with *all* of this in essence in one full [sic] swoop, we simply closed the lid on the entire issue.") (emphasis added).

[13] PX 11, p. 1; *see also* PX 12, p. 1 ("In recent years, extremist homosexual, lesbian and bisexual activists and their supporters have launched a multi-pronged legislative offensive on national, state and local government levels."); PX 21 ("The so-called 'gay rights movement' is gaining ground...here in Colorado."); PX 22, p.1 (tabloid circulated by CFV with "astonishing, fully-documented reports of the actual goals of homosexual extremists").

[14] PX 12, p. 46; *see also id.* at 46 (one gay rights group allegedly "a truly fascist organization" which subscribed to "consciously 'subversive modes, drawn largely from...*Mein Kampf*.'").

Amendment 2 argued that gays exercised dangerously excessive influence because they had the support of "the gay-sympathetic media." (PX 20, p.2). At trial petitioners made a major effort to prove this allegation. Witnesses called by petitioners warned that gays had "an inordinate influence on the media"[15] and "receive disproportionate and largely sympathetic attention from the print and electronic media",[16] an excessive influence which petitioners attributed to the existence of "open gays and lesbians in many newsrooms." (Tr. 1257). Petitioners also sought to establish the existence of undue gay influence in Hollywood. (Tr. 1250).

In addition, petitioners attempted at trial to buttress Marco's argument that gays exercised excessive power in three cities which had enacted gay rights ordinances--Denver, Boulder and Aspen. In two of these cities--Boulder[17] and Denver[18]--the ordinances had been approved by voters in public referenda. Thus, petitioners offered testimony attacking the political views of the voters themselves in those cities. The reason for Amendment 2, according to petitioners' expert witness, was that local majorities in those cities were "inflamed" (Tr. 1003), "completely reckless" (Tr. 1198), "felt very strongly and were concentrated" (Tr. 1001), and had "propensities to abuse." (Tr. 1224). The virtue of Amendment 2, he asserted, was

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[15] Tr. 1244; *see also id.* at 1245 ("access that would not be accorded to other groups"), 1247 ("pro gay bias" on television; networks "enormously biased.").

[16] DX CC, pp. 26-27; *see also* DX 44, p. 2 ("[H]omosexuals enjoy support from every major news organization, whose coverage long ago crossed the line into outright advocacy of homosexual causes.").

[17] PX 39 (ordinance approved by vote of 7916 to 7621).

[18] PX 29 (ordinance approved by vote of 55,173 to 45,771).

that it shifted control over gay rights in those three cities out of the hands of local voters who were "closely ideologically involved in the question of gay rights," and conferred it instead on a broader electorate with "different interests," whom he regarded as "the moderates . . . the centralists." (Tr. 1002).

That Colorado's highest officials actually sought at trial to prove that its political processes were imperiled by a conspiracy of gay extremists is quite extraordinary. The modest changes that have occurred in the law regarding sexual orientation, and the professional successes of some gay people, would convince none but the paranoid that Colorado or any other state is actually threatened by "militant gay aggression." This argument bears an unsettling resemblance to the canard voiced half a century ago that Jews, who in fact then faced widespread and open discrimination, were somehow covertly exercising control over the nation's policies. Not since the heyday of Jim Crow have state officials attacked as a threat to the "body politic" the enactment of minimal protections for an unpopular group. The trial court understandably rejected these outlandish claims. (Pet. App. C-8).

In this Court, petitioners, although not directly attacking the findings of the Colorado Supreme Court, assert that the actual purpose of Amendment 2 was to assure that sufficient funds were available to enforce existing prohibitions against discrimination on the bases of race, gender and religion.[19] This proffered explanation is utterly implausible. The trial court concluded, to the contrary, that

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[19] "Amendment 2 is an appropriate means by which the people sought to focus government's limited resources upon those circumstances most warranting attention." Pet. Br. 41. Although petitioners suggest that there might be other rational bases for Amendment 2, this is the only basis which petitioners assert was the *actual* purpose of that provision.

applying anti-discrimination laws to sexual orientation would have entailed little if any additional cost:

> The facts don't support defendants' position . . . . [A]ctual experiences show that the presence of a sexual orientation provision has not increased costs or impaired the enforcement of other civil rights statutes or ordinance . . . . [T]his court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.[20]

Amendment 2 does not provide that any nominal savings must or even should be utilized to enforce other anti-discrimination provisions, does not require that the state or localities appropriate any funds at all for enforcing those provisions, and leaves Colorado and its subdivisions free to repeal completely any existing statutes or ordinances that prohibit discrimination on the basis of race, gender or religion. Petitioners acknowledged below that extension of state anti-discrimination laws to sexual orientation would require no more than a single additional employee at the Colorado Civil Rights Division.[21] It is quite unbelievable that the sponsors of Amendment 2 would have solicited

[20]Pet. App. C-9 - C-10. Petitioners conceded below that enforcement of the Denver ordinance, for example, had involved no significant cost to the city. Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.) p. 29 ("[T]he Denver experience reflected little fiscal impact.").

[21] In the court below, the only argument advanced by petitioners regarding the impact of a possible state ban on sexual orientation discrimination was that in Wisconsin, a state substantially larger than Colorado, "almost a full time position was required to handle the . . . new civil rights filings each year precipitated by the sexual orientation law." (Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.), p. 29.).

more than 50,000 petition signatures (PX 21), expended hundreds of thousands of dollars (Tr. 747-48, 1046), and waged a year long state wide campaign merely to prevent the addition of a single worker to a state payroll that already numbered more than 156,000.[22]

There is, moreover, no mention whatever of this purported purpose in the flyers prepared by the proponents of Amendment 2, hundreds of thousands of which were circulated prior to the referendum. Rather, in language similar to Marco's testimony, the flyers called for preemptive action "to STOP the 'gay' activists,"[23] warning darkly that gay voter--"militant[s]" and "extremists"--were pursuing "astonishing...goals"; "[w]hat they really want will shock and alarm you." (PX 22, p. 1). The description of those alleged goals included topics, such as "Target: Children" and "Objective: Destroy the Family." (PX 22, pp. 2, 4). Much of this literature was baldly framed to inculcate blind animus toward gay voters by portraying them as an evil clique unworthy to participate in any aspect of civilized society. CFV insisted at length that central goals of gays included legalizing, and engaging in, pedophilia,[24] desecrating churches, and assaulting members of the clergy. (PX 21). The flyers were replete with luridly explicit descriptions of

[22]*See* Bureau of the Census, *Public Employment in 1991* 11 (1992).

[23] PX 21 (capitalization in original).

[24] PX 22, p. 2 ("[P]edophilia (the sexual molestation of children) is actually an accepted part of the homosexual community....Don't let gay militants double-talk hide their true intentions. Sexual molestation of children is a large part of many homosexuals' lifestyle....Say no to sexual perversion with children--vote YES on Amendment 2!").

bizarre sexual practices.[25] One bold-faced headline warned: "Lesbians are now having babies conceived by homosexual semen". (PX 21).

C. The Purpose Found by the Courts below Is Constitutionally Impermissible.

In *Carrington v. Rash*, 380 U.S. 89 (1965), Texas refused when registering voters to recognize as bona fide residents any member of the armed forces who had not been a Texas resident when he or she entered the service. The state sought to justify this statute as a method of preventing military personnel from dominating local elections. The Court held that such a purpose was unconstitutional *per se*:

> [T]he State's first contention is that the...provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area....But..."[f]encing out" from the franchise a sector of the population *because of* the way they may vote is constitutionally impermissible.

[25] PX 21; PX 22, p. 4; see also PX 20 (CFV letter referring to accompanying "Shocking brochure" with "graphic, disgusting facts" that will "shock and repel").

380 U.S. at 93-94 (emphasis added); *see also id.* at 94 (right to vote cannot be restricted "because of fear of the political views of a particular group").

This holding in *Carrington* has been reiterated by this Court on numerous occasions. In *Cipriano v. Houma*, 395 U.S. 701 (1969), the Court emphasized that it was "constitutionally impermissible" to preclude non-landowners from voting on the issuance of revenue bonds because their interests, and thus likely voting behavior, were different than those of property owners. 395 U.S. at 705-06. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the state sought to justify a one-year residence requirement for voters as a method of assuring that new voters would share the interests of existing residents. This Court held:

> Tennessee's hopes for voters with a "common interest in all matters pertaining to [the community's] government is impermissible"...."[D]ifferences of opinion" may not be the basis for excluding any group or person from the franchise...."[T]he fact that newly arrived [Tennesseans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state."

405 U.S. at 355-56 (footnote omitted); *see also Evans v. Cornman*, 398 U.S. 419, 422-423 (1970).

This Court has also held that district lines that may not be drawn for the avowed purpose of minimizing the political influence of a targeted group. *Burns v. Richardson*, 384 U.S. 73 (1966), recognized that the Constitution would not permit use of a district plan "designed to...minimize or

cancel out the voting strength of racial or *political* elements of the voting population." *Id.* at 89 (emphasis added). In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court reiterated that multimember districts would be unconstitutional if "invidiously discriminatory because they were employed to minimize or cancel out the voting strength of racial *or political elements* of the population." 412 U.S. at 751 (emphasis added), *quoting Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). In *Mobile v. Bolden*, 446 U.S. 55, 69, n.14 (1980), the Court stressed that the term "employed" in this passage in *Gaffney* referred to "the existence of discriminatory purpose." *Gaffney* also indicated that the boundaries of particular legislative districts could not be intentionally drawn "to minimize or eliminate the political strength of any group or party." 412 U.S. at 754. *Davis v. Mann*, 377 U.S. 678, 691 (1964), emphasized that a districting scheme adopted for the purpose of discriminating against "military and military-related personnel...is constitutionally impermissible."

Most recently in *Davis v. Bandemer*, 478 U.S. 109 (1988), six members of the Court agreed that plaintiffs in a gerrymandering case could prevail by demonstrating "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127, (plurality opinion), 161 (Powell, J., concurring in part and dissenting in part). The Court expressly rejected the contention that the constitutional prohibition against invidious gerrymandering should be limited to race claims. *Compare* 478 U.S. at 125-27 (plurality opinion) *with* 478 U.S. at 144-61 (dissenting opinion).

In the instant case, Colorado unquestionably would have violated the Constitution if, as in *Carrington*, the state had concocted some voter registration requirement that disproportionately screened out gays and did so with the intent "to deny [them the] right to participate equally in the

political process." (Pet. App. B-22). The state would have also acted unconstitutionally if it had mandated an invidious gerrymander of city council districts in Aspen, Denver or Boulder for the avowed purpose of "minimiz[ing] or cancel[ing] out the voting strength" of gay voters. *Gaffney*, 412 U.S. at 752. The result is no different here merely because, in seeking to accomplish a similar discriminatory result with an identical invidious purpose, Colorado has chosen instead a different method of manipulating its political process. The Fourteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

To be sure, the particular device at issue in this case is different from the practices in *Carrington* and *Davis v. Bandemer*. But the constitutional transgression in those cases concerned the purpose of the government action, not the specific manner in which the state had sought to further the constitutionally impermissible goal. The Colorado Supreme Court below concluded that the purpose of Amendment 2 was to eviscerate the political power of gay voters and organizations to bring about changes in state or local laws with which the proponents of Amendment 2 happened to disagree. Such a deliberate scheme

> to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views.

Richardson v. Ramirez, 418 U.S. 24, 83 (1976) (Marshall, J., dissenting).

Nothing in *James v. Valtierra*, 402 U.S. 137 (1971), is to the contrary. There was no claim in that case that the

California constitutional provision there at issue had been adopted for the purpose of preventing equal political participation by the poor. On the contrary, both the District Court opinion and the dissenters in this Court relied exclusively on the effect of that provision[26]. The majority stressed that under the circumstances in that case the California provision mandating referenda to review the creation of certain housing projects "demonstrate[d] devotion to democracy, not bias, discrimination, or prejudice." 402 U.S. at 141. Unlike Amendment 2, which was deliberately framed to obstruct in the most sweeping manner every conceivable anti-discrimination action, the California provision did not apply to any of the myriad of non-housing actions local officials might take to benefit the indigent, such as providing Head Start programs, school lunches, remedial education under Title I, etc. Even with regard to housing for the poor, no referendum was required if local officials chose to provide subsidies for indigent tenants in private housing, to use zoning laws to require developers to include units for low income tenants, or to forbid landlords from discriminating against tenants receiving welfare. Nor did the California measure require indigent voters to meet the often onerous burdens necessary to initiate a referendum. In sum, the provision in *James* was directed at a quite specific type of housing project, not at interfering generally with effective political participation by indigent voters.

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[26] 402 U.S. at 145 (Marshall, J., dissenting) ("substantial burden...on the poor); *Valtierra v. James*, 313 F. Supp. 1, 6 (N.D. Cal. 1970) ("[L]ack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.").

D. Amendment 2 Has the Effect of Denying Gay Voters an Equal Opportunity to Participate Effectively in the Political Process.

A state law or constitutional provision is not necessarily invalid solely because it was motivated by a desire to reduce the political impact of a group of voters. For example, a districting plan framed to eliminate a disproportionate advantage previously enjoyed by one political party, and which merely resulted in representation that is "a rough approximation of the statewide political strengths of the Democratic and Republican parties," would pose no constitutional problem. *Gaffney*, 412 U.S. at 752. Similarly, limits on campaign contributions, even though directed at least in part at curbing disproportionate influence or access by rich contributors, serve at most to equalize the ability of contributors to advance favored candidates. *Buckley v Valeo*, 424 U.S. 1, 25-26 (1976). In order to violate Equal Protection, a scheme not only must be animated by an intent to reduce the influence of an identifiable group of voters, but also must have the effect of "consistently degrad[ing] a voter's or a group of voters' influence on the political process...." *Davis v Bandemer*, 478 U.S. at 109.

Amendment 2 is not a mere "gauntlet" or "hurdle;" rather, Amendment 2 is a virtually insuperable barrier to the adoption of any governmental measures protecting gays from discrimination. In the court below petitioners correctly characterized Amendment 2 as such a flat prohibition:

> [T]he plain language of Amendment 2 itself...remove[s] state and local government from the issue [of gay rights]

> altogether....Amendment 2 was about the *resolution* of the debate...a final decision is made on this divisive issue.[27]

Other lower court briefs submitted by petitioner were equally emphatic in describing Amendment 2 as an absolute and definitive bar.[28]

In this Court, however, petitioners seek to recharacterize Amendment 2 as merely altering the process for enacting gay rights legislation. Petitioners do not rely in this regard on the actual language of Amendment 2, which is on its face a flat prohibition, but instead tacitly invoke Article V, section 1 of the Colorado Constitution, which permits future amendments. Thus, petitioners reason, Amendment 2 has not prohibited laws or ordinances against sexual orientation discrimination, but merely established a new process under which, as part of adopting any such enactments, the constitution of Colorado would first have to be amended by statewide referendum. But the hypothetical possibility of subsequent constitutional amendments does not convert an unequivocal constitutional prohibition into a mere process for taking the forbidden action. In petitioners' view the Establishment Clause of the First Amendment would constitute, not a barrier to the creation of a national

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[27] Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.), pp. 39, n.57, 45 (emphasis in original).

[28] Opening Brief, Case No. 93 SA 017 (Colo. S. Ct.), pp. 5 ("Amendment 2...barred special civil rights protections"), 12 ("Amendment 2...prohibits" adoption of certain anti-discrimination rules); Reply Brief, Case No. 93 SA 017 (Colo. S. Ct.), p. 7 ("Amendment 2 prohibits adopting of specific civil rights protections); Brief in Support of Defendant's Motion to Dismiss, Case No. 92 CV 7223 (D. Ct. Denver), pp. 2 ("prohibits"), 5 ("prohibition"), 25 (Amendment 2 places civil rights protections for homosexuals "beyond the competency of government officials.").

church, but merely a decision to let Congress, in consultation with three-quarters of state legislatures, determine which particular religious sect all Americans should be compelled to join. In adopting Amendment 2, Colorado has erected against adoption of anti-discrimination measures a barrier as insurmountable as is possible to create in a democracy. Three decades ago in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), this Court rejected this same argument that a provision of the Colorado constitution diluting the votes of certain voters could be upheld merely because Colorado voters retained the right to amend their state's constitution. 377 U.S. at 732, 733, 737.

Even if the possibility of further amending the Colorado constitution is considered, the burden imposed by Amendment 2 is too severe. In the wake of Amendment 2, proponents of any protections against sexual orientation discrimination bear the burden of obtaining the more than 54,000 signatures necessary to even obtain a public vote.[29] If, for example, such a measure were sought by the people of Aspen, the number of signatures needed would be 130 times the total number of voters in the town.[30] Under Amendment 2, the overwhelming majority of the voters could be hundreds of miles from, for example, the town of Aspen, and understandably unfamiliar with, if not indifferent to, local problems. The critical reason for placing a barrier to gay rights legislation in the Colorado Constitution, petitioners themselves emphasized below, was to create an

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[29] Article V, section 1(2) of the Colorado Constitution requires petition signatures equal to five percent of the votes cast in the most recent election for secretary of state.

[30] There are 4031 registered voters in the town of Aspen.

obstacle that could "not be easily displaced or circumvented."[31]

As petitioners frankly acknowledge, Amendment 2 was framed and enacted for the avowed purpose of overturning, and preventing further adoption of, measures that prohibited discrimination by state and local government officials in Colorado. (Pet. Br. 6). There were at least ten such measures directed exclusively at preventing governmental discrimination: (a) an executive order issued by the governor prohibiting employment discrimination on the basis of sexual orientation by any state agency,[32] (b) prohibitions issued by officials of, and applicable to employment by, Boulder County (PX 118), the Denver Police (PX 32), the Denver Public Library (PX 31), and the City and County of Denver (PX 10), against sexual orientation discrimination in government employment, (c) a prohibition generally forbidding discrimination on the basis of sexual orientation by Denver officials with regard to government housing, contracting services, and credit (PX 36), (d) general prohibitions adopted by at least two state colleges against sexual orientation discrimination in employment or education (Pet. App. D-25), and (e) directives issued by the Denver Police Department forbidding police officers from engaging in harassment, or making derogatory remarks in radio transmissions, with regard to sexual orientation. (PX 33, PX 34). In addition, the local ordinances forbidding discrimination on the basis

[31] Opening Brief, Case Nos. 94 SA 048 and 94 SA 128, (Colo. S. Ct.), p. 52.

[32] PX 46. That prohibition is reflected in Colorado civil service regulations. PX 47.

of sexual orientation often applied to governmental as well as private entities.[33]

Amendment 2 invalidates these and any future prohibitions against discrimination by employees of Colorado or its political subdivisions. Amendment 2 was openly advocated as a method of preventing elected officials from interfering with discrimination by their subordinates.[34] The provision does so by directing in part that neither the state, its agencies, nor its subdivisions

> shall...adopt or enforce any...policy whereby homosexual...orientation...shall constitute...the basis of...any claim of...discrimination.

Measures such as the governor's executive order forbidding employment discrimination by his or her subordinates is just such a "policy" clearly forbidden by the language of the Amendment.

Amendment 2, in an unprecedented and quite bizarre manner, obstructs the normal operation of the political process and of state and local government. The purpose and effect of the Amendment is to strip elected officials, and any other supervisory officials down through the chain of command, of any power to interfere with decisions by their subordinates to engage in discrimination. The governor may opt to make his own decisions in a non-discriminatory manner, but he cannot direct "[t]he head of each principal department" to do the same. (Compare PX 44). The Denver Chief of Police may avoid harassing anyone on the basis of

[33] PX 37 (Boulder ordinance applies without limitation to all employers); PX 48 (Aspen ordinance applies to "any...government agency").

[34] PX 22, p. 7 (urging vote for Amendment 2 in order to protect "[g]overnment workers" who object to "hir[ing] gays" and "promot[ing] homosexuals").

sexual orientation, but he cannot order "all Police Department personnel" to refrain from such actions. (Compare PX 33). The mayor of Denver may chose not to personally discriminate in decisions regarding government housing, services, contracting, etc., but he cannot require "all department heads" to follow a similar course. (Compare PX 36).

Amendment 2 places each of the hundreds of thousands of state and local government employees in Colorado, insofar as they may wish to discriminate against gays, outside the powers of any elected official and thus beyond the reach of the political process. Petitioners argue that a presumption of propriety should be accorded to choices made by government officials "who are accountable to" "those put in authority by the electoral process" (Pet. Br. 32 n. 22); but a core purpose of Amendment 2 is to guarantee that state and local government employees in Colorado will *not* be so accountable. Discrimination against homosexuals in the exercise of governmental power is in Colorado the constitutional right of every individual police officer, school teacher, office supervisor, public housing official, and college admissions clerk. Far from bringing about uniformity, this near anarchical scheme means that whether a gay applicant can obtain a government job, or be admitted to a state college, turns solely on the whims and biases of whichever official happens to be charged with making that particular decision.

On repeated occasions this Court has emphasized that individuals aggrieved by injury at the hands of government officials must--in the absence of a clear constitutional transgression--look to the political process for redress. For gay victims of discrimination in Colorado today, that is simply impossible. Gay applicants denied state jobs on the basis of sexual orientation cannot obtain redress from even a willing governor, and, if dissatisfied with a hostile governor's lack of response, cannot improve their situation by voting into office a new governor sympathetic to their plight. It is a mockery of democracy to assert of this

situation, as do petitioners (Pet. Br. 11, 26, 27), that gays remain free to run for office or to vote for the candidates of their choice. For gay voters aggrieved by sexual orientation discrimination on the part of state or local government employees, the political process has been deliberately rendered an empty charade.

CONCLUSION

For the above reasons the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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No. 94-1039

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In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN AND THE CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF OF THE CITIES OF ATLANTA, BALTIMORE, BOSTON, LOS ANGELES, MADISON, NEW YORK, PORTLAND, SAN FRANCISCO, SEATTLE AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Statement of Interest 1

Summary of Argument 3

Argument 3

Amendment 2 Facially Violates the Equal Protection Clause..... 3

A. Amendment 2 Creates A State Constitutional Privilege To Discriminate That State and Local Officials are Powerless to Control 4

B. Amendment 2 Is Not Rationally Related to a Permissible Governmental Objective..... 10

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 4, 8, 10, 11, 13

Cruzan v. Director, Mo. Health Dept., 497 U.S. 261 (1990) 9

Evans v. Romer, 854 P.2d 1270 (Colo.) ("Evans I") 3

Evans v. Romer, 882 P.2d 1335 (Colo. 1994) ("Evans II") 3, 6, 12

FCC v. Beach Communications, 508 U.S. ___, 113 S. Ct. 2096 (1993) 11

Gordon v. Lance, 403 U.S. 1 (1971) 11, 13

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 13

Hunter v. Erickson, 393 U.S. 385 (1969) 12

James v. Valtierra, 402 U.S. 137 (1971) 13

Kramer v. Union Free School District, 395 U.S. 621 (1969) 13

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 14

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) 11

Palmore v. Sidoti, 466 U.S. 429 (1984) 9

Plyler v. Doe, 457 U.S. 202 (1982) 4

Reitman v. Mulkey, 387 U.S. 369 (1967) 6, 13

United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) 11, 13

Vance v. Bradley, 440 U.S. 93 (1979) 11

TABLE OF AUTHORITIES – Continued

Page

Washington v. Davis, 426 U.S. 229 (1976) 13

Wayte v. United States, 470 U.S. 596 (1985) 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4, 8, 9

Zobel v. Williams, 457 U.S. 55 (1982) 13

STATUTES

Supreme Court Rule 37.3 1

Supreme Court Rule 37.5 1

Colorado Constitution article II, §30 (1992) ("Amendment 2") ..... *passim*

STATEMENT OF INTEREST

Amici curiae – the cities of Atlanta, Baltimore, Boston, Los Angeles, Madison, New York, Portland, San Francisco, Seattle, and the National Institute of Municipal Law Officers (NIMLO), submit this brief in support of respondents Richard Evans, *et al.* Municipal Amici submit this brief pursuant to Supreme Court Rule 37.5. NIMLO's participation is authorized by the consent of the parties pursuant to Supreme Court Rule 37.3. Written consent for NIMLO's participation, from the counsel of record for each party, is on file with the Clerk of the Supreme Court. Amici are collectively referred to here as "the cities."

This case concerns whether Amendment 2 to the Colorado Constitution, Colo. Const. art. II, §30 (1992) ("Amendment 2"), violates the Equal Protection Clause of the Fourteenth Amendment. Amendment 2 forbids all of Colorado's state and local governments from adopting or enforcing any law or policy that allows any person to seek redress for discrimination on the basis of gay, lesbian, or bisexual orientation.

The cities have a direct interest in the resolution of this question. All of the cities have adopted anti-discrimination ordinances or policies that seek to protect individuals from invidious discrimination and mistreatment and to promote respect and equal rights for all members of society. In each named amicus city, these protections include some form of prohibition against discrimination based on sexual orientation. Several of the cities are located in states where measures similar to Amendment 2 are being considered. (Pet. Cert. at 20.)

Petitioners Roy Romer as Governor and the State of Colorado have argued that a state may amend its constitution to forbid state and local governments from adopting or enforcing any policy that prohibits discrimination against any disfavored group, so long as the group has not been determined to be a suspect class under equal protection analysis. None of the named cities have limited the protection of their local anti-discrimination ordinances and policies to suspect classifications. The cities have adopted ordinances and policies that prohibit discrimination based upon, for example, age, physical and mental disability, veterans' status and marital status. If petitioners' view prevails, the cities' efforts to combat discrimination based on all arbitrary, status-based characteristics of concern to local citizens would be in jeopardy.

The National Institute of Municipal Law Officers (NIMLO) is a non-profit, non-partisan organization, consisting of over 1400 local governments and their attorneys. Member governments operate NIMLO through their chief legal officers, variously called city or county attorneys, corporation counsel, city solicitors, law directors, and other titles.

NIMLO is dedicated to gathering and disseminating information on recent legal developments that affect municipalities. NIMLO participates in a case in an amicus capacity when a majority of the Board of Directors determines that the case has nationwide impact and amicus support is warranted. In this case, NIMLO is concerned about the effect of state initiatives on local authority to protect human rights.

SUMMARY OF ARGUMENT

Amendment 2 adopts as state policy a governmental objective that is impermissible under the Equal Protection Clause. The provision creates a state constitutional privilege to discriminate against gay, lesbian, and bisexual persons in every conceivable area of public and private life. Such a policy is directly contrary to the basic purpose of the Equal Protection Clause – to ensure that similarly situated persons shall be similarly treated under the law.

ARGUMENT

AMENDMENT 2 FACIALLY VIOLATES THE EQUAL PROTECTION CLAUSE.

The Colorado Supreme Court strictly scrutinized Amendment 2. *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994) ("Evans II"); *see also, Evans v. Romer*, 854 P.2d 1270, 1286 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993) ("Evans I"). The court reasoned that Amendment 2 burdens the fundamental right to political participation. Amici agree. This basis of decision has been well discussed and developed in other briefs.

The cities believe the decision of the Colorado Supreme Court is correct for another reason of particular concern to local governments. Even under a rational basis test, Amendment 2 is invalid because it purports to create a privilege to discriminate which sweeps so broadly that it bears no rational relationship to any conceivable objective that government may legitimately pursue. Thus, the Court

need not consider whether Amendment 2 involves a suspect classification or burdens a fundamental right in order to find Amendment 2 unconstitutional.

The Equal Protection Clause protects all persons from arbitrary discrimination – not just members of racial and ethnic minorities. *See, Yick Wo v. Hopkins,* 118 U.S. 356, 368-69 (1886). The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216 (1982)).

Amendment 2 is unconstitutional on its face because it adopts a substantive state policy that contradicts this fundamental direction. Amendment 2 creates a positive power and privilege to discriminate against gay, lesbian and bisexual individuals solely on the basis of prejudice. Amendment 2 declares Colorado policy that *no* gay, lesbian, or bisexual person shall *ever* be considered to be similarly situated to *any* heterosexual person with respect to *any* power, right or privilege – whether public or private. This policy cannot coexist with the mandate of equal protection that governmental classifications be rationally related to a permissible governmental objective.

A. AMENDMENT 2 CREATES A STATE CONSTITUTIONAL PRIVILEGE TO DISCRIMINATE THAT STATE AND LOCAL OFFICIALS ARE POWERLESS TO CONTROL.

Petitioners profoundly mischaracterize the scope and effect of Amendment 2 in at least two respects. First,

petitioners argue that Amendment 2 merely repeals previously adopted statutes, ordinances and policies that prohibited discrimination based on sexual orientation. (Pet. Brf. at 6.) Petitioners assert that gay, lesbian and bisexual individuals "would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2." (*Id.*) According to the petitioners, gay, lesbian and bisexual individuals in Colorado stand in the same shoes today as they did before the adoption of anti-discrimination laws that specifically mention sexual orientation.

Second, petitioners argue that Amendment 2 merely preempts local anti-discrimination measures. (Pet Brf. at 9-10.) Petitioners argue that respondents are seeking "to immunize from preemption special protections that have been conferred upon homosexuals and bisexuals." (*Ibid.*) Thus, petitioners defend Amendment 2 as involving only a state allocation of authority among political subdivisions. (*Id.* at 14.) *See also,* Brief of Amici Curiae States of Alabama, California, et al. at 8 (states can grant and withdraw powers to local governments at their pleasure).

Petitioners disregard the plain text – and the extraordinarily broad reach – of Amendment 2:

> *Neither the State of Colorado,* through any of its branches or departments, *nor any of its* agencies, political subdivisions, *municipalities* or school districts, *shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexuals, lesbian or bisexual orientation,* conduct, practices or relationships *shall* constitute or otherwise *be the basis of,* or entitle any person or

> class of persons to have or claim *any* minority status, quota preferences, protected status or *claim of discrimination*. This Section of the Constitution shall be self-executing.

Amendment 2 (emphasis added).[1]

Amendment 2 goes far beyond repeal and preemption of anti-discrimination policies.[2] Amendment 2 purports to install a privilege to discriminate against gay, lesbian and bisexual individuals as a substantive policy on equal footing with the other individual liberties secured by Colorado's constitution. This Court considered a similar, though significantly narrower measure, in *Reitman v. Mulkey*:

> The right to discriminate . . . [is] now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing . . . discrimination need no longer rely solely

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[1] The Colorado Supreme Court based its holding on Amendment 2's provisions regarding gay, lesbian, or bisexual *orientation*, not Amendment 2's additional prohibition of protections arising from "homosexual, lesbian, or bisexual . . . conduct, practices or relationships." This brief thus focuses on Amendment 2's prohibition of claims of discrimination based on sexual orientation.

[2] This Court must consider Amendment 2 and its effects in their entirety. The Colorado Supreme Court struck down Amendment 2 as a whole because the court concluded that the measure's provisions were not severable as a matter of state law. *Evans* II, 882 P.2d at 1349. Given this decision of state law by Colorado's highest court, this Court has not been asked whether certain of Amendment 2's provisions as applied in certain circumstances could withstand equal protection scrutiny.

> solely on their personal choice. They [may] now invoke the express constitutional authority, free from censure or interference of any kind from official sources.

387 U.S. 369, 377 (1967) (holding the creation of such authority unconstitutional, even where it authorizes only private acts of discrimination in housing).

Amendment 2's effect of endorsing and immunizing *public* discrimination, no matter how invidious or arbitrary, is particularly egregious. Even in the absence of specific legislative authorization, state and local officials normally have the power and the duty to prevent subordinate public employees from acting arbitrarily. For example, a local director of public health would need no legislative guidance to discipline an employee who refuses to inoculate left-handed children.

Administrative decisions based solely on prejudice against gay, lesbian or bisexual individuals are equally arbitrary. Amendment 2 prevents administrators from proscribing this form – and only this form – of arbitrary action. The effects of this policy would be felt across a virtually limitless range of local government responsibilities.

A single example easily illustrates the hopeless bind in which Amendment 2 would place local governments. Suppose that an employee of the local library who processes applications for library cards refuses to provide library cards to gay, lesbian or bisexual patrons because the employee does not want to encounter these persons in the public library. An applicant complains to the city that it has discriminated against her because she was told

she could not have a library card because she is a lesbian. City policy establishes that the mission of the public library is to make information widely available to members of the public.

Nevertheless, Amendment 2 would prevent the city from disciplining the library employee. Such discipline would "enforce [a] policy whereby . . . lesbian . . . orientation [would] be the basis of . . . any . . . claim of discrimination." Amendment 2. Worse, the city librarian could not issue a directive that staff may not take sexual orientation into account when issuing library cards. Such a directive would violate the state constitution by creating a policy protecting against discrimination based on sexual orientation.

Under well-settled equal protection precedents, the library patron's right to equal application of the laws has been violated. If any public function is "administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" the government has denied equal protection of the laws. *Yick Wo*, 118 U.S. at 373-74. Although *Yick Wo* involved a classification that would today be described as "suspect," its proscription of arbitrary governmental conduct remains in force in the requirement that all classifications *at least* be rationally related to a legitimate governmental interest. *See, Cleburne*, 473 U.S. at 448.

There is no conceivable basis for arguing that lesbian and heterosexual citizens are not similarly situated with respect to routine access to institutions such as the public

library. Under *Yick Wo*, even isolated instances of arbitrary treatment are unconstitutional. It necessarily follows that a state may not enshrine in its constitution a positive privilege for its employees to discriminate with impunity in the performance of their duties. Our institutions of government "do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 369-70. Accordingly, the state may not mandate that governmental entities do nothing to prevent such arbitrary treatment by their agents.

Thus, contrary to petitioners' assertions, Amendment 2 dramatically changes the *status quo* prior to the adoption of positive prohibitions on discrimination based on sexual orientation.[3] Amendment 2 seeks to affirmatively disable any instrumentality of Colorado state or local government from prohibiting or penalizing arbitrary action or invidious discrimination, even where it is undisputedly based solely on prejudice, so long as the facts surrounding the act of discrimination involve the complainant's gay, lesbian, or bisexual orientation. This situation presents an extreme case of what the Court proscribed in *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984): "Private biases may be

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[3] The cities agree that neither states nor their subdivisions are required to legislate against discrimination at all, and that governments are free to repeal such protections once extended. Amendment 2 is not protected by these principles because it *disables* governments from extending such protections to a single class of individuals based on their status alone rather than on some neutral principle. The Equal Protection Clause, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me," *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. 261, 300 (1990) (Scalia, J. concurring), does not tolerate such a measure.

outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (Quoted in *Cleburne*, 473 U.S. at 448.) Amendment 2 seeks to *compel* governments to give effect to the biases of their own employees. Where such employees have been vested with significant discretion, their authority to employ bias arbitrarily is particularly pernicious.

The result is to place government agencies in an impossible bind. By complying with Amendment 2, a state or local government entity would, in many instances, expose itself to liability under the Equal Protection Clause for arbitrary and invidious discrimination. By complying with the mandates of the Equal Protection Clause, a state or local government entity would expose itself to liability under Amendment 2 from public employees or others seeking to defend their right to discriminate. The Supremacy Clause resolves this conflict. Amendment 2 violates the United States Constitution.

B. AMENDMENT 2 IS NOT RATIONALLY RELATED TO A PERMISSIBLE GOVERNMENTAL OBJECTIVE.

Under the rational basis test, a legislative classification is entitled to deference and is generally sustained if it is rationally related to a legitimate governmental interest. *Cleburne*, 473 U.S. at 440. Nevertheless, a classification is invalid where it furthers only an impermissible purpose. The Court's usual presumption that the democratic process will eventually rectify improvident decisions

only applies *"absent some reason to infer antipathy." Vance v. Bradley*, 440 U.S. 93, 97 (1979), *quoted in FCC v. Beach Communications*, 508 U.S. ___, 113 S. Ct. 2096, 2101 (1993) (emphasis added).

"[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (requirement that all household members be related creates irrational classification where motivated by illegitimate purpose of preventing "hippies" from participating in food stamp program).[4]

"If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality [is] suspect." *Cleburne*, 473 U.S. at 452 n.4 (Stevens, J. & Burger, C.J., concurring); *see also, Wayte v. United States*, 470 U.S. 596, 608 n. 10 (1985) (showing of discriminatory intent unnecessary where equal protection claim based on overtly discriminatory classification). Here, the text of Amendment 2 itself displays antipathy toward gay, lesbian or bisexual people and declares its core purpose to impact adversely the disfavored class. Amendment 2

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[4] It is of no consequence that Amendment 2 was adopted by the voters rather than a representative legislature. "[T]he electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause." *Cleburne*, 473 U.S. at 448; *see also, Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964). Indeed, the "Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy." *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

deprives gay, lesbian and bisexual individuals of protection from discrimination based on sexual orientation while retaining such protection for heterosexual people. Amendment 2; *see also, Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (majority needs no protection from discrimination).

Furthermore, petitioners have not contested the Colorado Supreme Court's conclusion that imposing an adverse impact on gay, lesbian, and bisexual people was the declared purpose of Amendment 2:

> Amendment 2 *sought to deny an independently identifiable group's right to participate equally in the political process*. . . . ¶ . . . Amendment 2 also *is intended to deny the same right* to persons based on 'homosexual, lesbian, or bisexual . . . conduct, practices, or relationships. . . . '

Evans II, 882 P.2d at 1349 (emphasis added). The legislative history confirms this purpose. The Colorado legislative council's analysis of Amendment 2 informed voters that gay, lesbian and bisexual persons experienced discrimination in many contexts, including employment, housing, public accommodations, health care, and education. (Pet. Cert. App. F-3.) Several agencies of state and local government had thus recognized a need to protect gay, lesbian and bisexual individuals from discrimination based on their sexual orientation. (Pet. Cert. App. F-3 through F-6.) Voters were informed that if Amendment 2 passed, it would nullify these protective policies and state and local governmental officials would have no

power to adopt or enforce similar policies. *See, Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J. concurring) (what actually happened is best evidence of discriminatory intent).

Normally, where the record reveals that a classification is motivated by an illegitimate purpose, the Court reviews other proffered purposes to ensure that impermissible objectives were not the *only* reason for the classification. *See, Cleburne*, 473 U.S. at 448-450. Here, however, the universal reach of the antipathy codified in Amendment 2 makes such review unnecessary.

Amendment 2's blanket endorsement of discrimination, even where it is based solely on prejudice, makes it unlike measures previously considered by this Court. The Court's equal protection jurisprudence has principally addressed classifications alleged to burden the exercise of particular rights in particular contexts. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (limiting veterans' tax exemption based on duration of residency); *Zobel v. Williams*, 457 U.S. 55 (1982) (restricting distribution of government funds based on length of residency); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (restricting distribution of government benefits based on household membership); *Gordon v. Lance*, 403 U.S. 1 (1971) (requiring referendum to incur bonded indebtedness or increase taxes); *James v. Valtierra*, 402 U.S. 137 (1971) (requiring referendum to approve low-income housing); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (limiting voting eligibility for school board members to parents and property owners); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (authorizing private discrimination in housing). By contrast, Amendment 2 adopts a *blanket*

endorsement of discrimination in every arena of social life.

Because of Amendment 2's universal reach, the Court need not decide whether gay, lesbian or bisexual orientation can be a legitimate basis for some governmental decisions. *No conceivable purpose* could legitimately justify a *global* policy affirming discrimination in all matters. This is true whether the policy classifies individuals based on sexual orientation, residency, pregnancy, native language, intelligence, age, disability, or any other personal characteristic that does not trigger strict scrutiny. "The state's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring). A universal policy affirming or even tolerating discrimination, even where it is based solely on prejudice, can have no such basis. It is fundamentally at odds with the Equal Protection Clause.

CONCLUSION

For all the reasons set forth above, the judgment of the Colorado Supreme Court should be affirmed.

Dated: June 19, 1995

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No. 94 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, *et al.*
Petitioners,

vs.

RICHARD G. EVANS, *et al.*
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.4 of the Rules of this Court *amicus* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents. Petitioners have consented to the filing of this brief. Respondents offered no response.

The Gay and Lesbian Lawyers of Philadelphia is a bar association organized to promote the civil and human rights of lesbians and gay men. It serves Pennsylvania, Southern New Jersey, and Delaware, with a roster of approximately 300 lawyers. GALLOP is recognized as a minority bar association by the Philadelphia Bar Association.

GALLOP members regularly represent victims of sexual orientation discrimination. New Jersey, the City of Philadelphia, and several other cities in Pennsylvania prohibit discrimination on the basis of sexual orientation in employment and other pursuits. Pennsylvania and Delaware have no statewide protection against

such discrimination.

GALLOP takes particular interest in this Court's interpretation of the federal Constitution inasmuch as it was written in the City of Philadelphia in 1787. Further, the Fourteenth Amendment, which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws, was adopted in 1868, under the leadership of Thaddeus Stevens, United States Representative from Pennsylvania.

Dated: June 19, 1995

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QUESTION PRESENTED

Whether discriminatory legislation enacted directly by popular vote is entitled to the same presumption of constitutionality as a measure enacted through the traditional legislative process?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

SUMMARY OF ARGUMENT ix

ARGUMENT 1

DISCRIMINATORY LEGISLATION ENACTED DIRECTLY BY POPULAR VOTE IS NOT ENTITLED TO THE SAME PRESUMPTION OF CONSTITUTIONALITY AS A MEASURE ENACTED THROUGH THE TRADITIONAL LEGISLATIVE PROCESS 1

I. THE UNITED STATES CONSTITUTION MANDATES THAT STATE POLITICAL STRUCTURES BALANCE MINORITY RIGHTS AGAINST THE RULE OF IMPASSIONED MAJORITARIANISM 1

A. The United States Constitution Guarantees Certain Substantive Rights Against the Rule of Majoritarian Will 1

B. The United States Constitution Also Guarantees Certain Processes Which, In Turn, Protect Against the "Unfiltered" Rule of Majoritarian Will 3

II. THIS COURT EVALUATES THE EFFICACY OF THESE FILTERS WHEN CONSIDERING CLAIMS BROUGHT UNDER THE FEDERAL EQUAL PROTECTION GUARANTEE 6

A. The Constitution Imposes these Filters into Legislative Lawmaking, thereby Justifying this Court's Customary Presumption of Constitutionality 7

B. When, however, These Filters Fail to Work Properly, this Court Withholds the Presumption of Constitutionality and Rigorously Scrutinizes the Legislation Enacted Thereby 11

III. FACIALLY DISCRIMINATORY DIRECT INITIATIVES WHOLLY BYPASS THESE VERY POLITICAL PROCESSES AND THEREFORE SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY 13

A. Direct Initiative Lawmaking, such as that Used in the Passage of Amendment 2, Fails to Balance Majority Rule Against Minority Rights. 13

B. Accordingly, this Court should not Presume Amendment 2 Constitutional but should Subject Amendment 2 to Heightened Scrutiny. 17

IV. BECAUSE THIS COURT SHOULD SUBJECT AMENDMENT 2 TO HEIGHTENED SCRUTINY, BY PETITIONERS' OWN CONCESSION, WELL-SETTLED PRINCIPLES OF EQUAL PROTECTION INVALIDATE AMENDMENT 2. . . 21

A. Petitioners Argue that this Court may not Disturb Amendment 2 Absent the Imposition of Some Form of Heightened Judicial Scrutiny 22

B. Amendment 2 Requires Heightened Scrutiny by this Court; Assuming, *arguendo*, the Accuracy of Petitioners' Argument, Amendment 2 Must Fail . . . 23

C. Hunter v. Erickson and its Progeny Invalidate State Allocations of Political Power Achieved on the Basis of a Non-Neutral, Group-Specific Principle 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 11, 18
Crawford v. Board of Education, 458 U.S. 527 (1982) . . . 25
Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825) 9
Everson v. Bd. of Education, 330 U.S. 1 (1947) 2
Hubbard v. United States, 115 S.Ct. 1754 (1995) 3
Hunter v. Erickson, 393 U.S. 385 (1969) 12, 22, 24
James v. Valtierra, 402 U.S. 137 (1971) 17
Kramer v. Union Free School Dist. No. 15,
395 U.S. 621 (1969) 12, 18
Lucas v. 44th Gen. Assembly of Colo.,
377 U.S. 713 (1964) 2, 17
Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 4, 20
Malloy v. Hogan, 378 U.S. 1 (1964) 2
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 5
Martin v. Struthers, 319 U.S. 141 (1943) 2
McLaughlin v. Florida, 379 U.S. 184 (1964) 12, 18
Missouri, K. & T. Ry. v. May, 194 U.S. 267 (1904) 9
Ogden v. Saunders, 25 U.S. 213 (1827) 9
Oregon Waste Systems, Inc. v. Oregon Dept.
of Environmental Quality, 114 S.Ct. 1345 (1994) 3
Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995) 3
Reynolds v. Sims, 377 U.S. 533 (1964) 4
Romer v. Evans, 854 P.2d 1270 (Colo. 1993) 17, 23
Schweiker v. Wilson, 450 U.S. 221 (1981) 10
United States v. Brown, 381 U.S. 437 (1965) 5
United States v. Carolene Products Co.,
304 U.S. 144 (1938) 11, 12, 22
United States v. Lopez, 115 S.Ct. 1624 (1995) 3
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U.S. Const. art. VI, §2 20
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No. 94 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, *et al.*
Petitioners,

vs.

RICHARD G. EVANS, *et al.*
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

BRIEF OF THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the motion that precedes this brief.

SUMMARY OF ARGUMENT[1]

Petitioners stress that Amendment 2 was approved directly by the people of Colorado in a democratic election, thereby implying

[1] *Amicus* relies on an article written by Professor Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503 (1990), and on the author's permission for its use herein, to develop this brief. Cf. Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 Cornell L. Rev. 527 (1994) (specifically criticizing Professor Eule's theory).

that Amendment 2 is entitled to at least the same presumption of validity as legislatively-enacted legislation. Brief for Petitioners at 3, 14. *Amicus* argues that the Constitution contemplates representative government and a divided power scheme in order to safeguard minority rights from the tyranny of a majority united by prejudice or the passion of the day. Accordingly, measures taken against minorities by popular vote are not entitled to such a presumption of validity.

Although American government derives its ultimate authority from the will of the people, the United States Constitution nonetheless imposes both substantive and procedural political processes by which it balances majority rule against the preservation of minority rights, even at the state level. When working properly, these mechanisms "filter" otherwise unrestrained majority rule to ensure that legislation does not arbitrarily burden constitutional rights.

Under such circumstances, this Court confers a presumption of constitutionality to such legislation on the belief that if the legislation passed through these "filters," there is no reason to believe that the Constitution has been violated. Whenever this Court suspects that these filters have failed to work properly, however, this Court withholds the presumption of constitutionality, thereby intensifying its role as a filter through which constitutionality is assured.

Direct initiative lawmaking, such as that used in the passage of Amendment 2, wholly bypasses these constitutionally-designed filters. In evaluating Amendment 2, a direct initiative which expressly burdens minority rights, this Court need not "suspect" but may presume that the filters played no part in balancing majority rule against minority rights. Accordingly, there is no reason this Court should accord the usual presumption of constitutionality to Amendment 2; indeed, *amicus* respectfully suggests that this Court should expressly withhold the presumption of constitutionality in this case and subject Amendment 2 to a more

searching judicial scrutiny.

Pursuant to these principles of heightened scrutiny, this Court's decision in Hunter v. Erickson, 393 U.S. 385 (1969), mandates that a state may not allocate political power on the basis of some non-neutral, group-specific principle. In the instant case, rather than merely repealing existing antidiscrimination laws which protected gays and lesbians from invidious discrimination, Amendment 2 went one step further and fundamentally reallocated political power along the type of non-neutral, group-specific principle condemned in Hunter. Accordingly, pursuant to a heightened scrutiny assumption, Amendment 2 wholly fails to comply with the Hunter mandate, and thereby violates the federal equal protection guarantee. On this basis, this Court should strike down Amendment 2.

ARGUMENT

DISCRIMINATORY LEGISLATION ENACTED DIRECTLY BY POPULAR VOTE IS NOT ENTITLED TO THE SAME PRESUMPTION OF CONSTITUTIONALITY AS A MEASURE ENACTED THROUGH THE TRADITIONAL LEGISLATIVE PROCESS.

I. THE UNITED STATES CONSTITUTION MANDATES THAT STATE POLITICAL STRUCTURES BALANCE MINORITY RIGHTS AGAINST THE RULE OF IMPASSIONED MAJORITARIANISM.

American government derives its ultimate legitimacy from the will of the people. The Constitution, however, expresses a clear preference against purely democratic lawmaking both at the state and the federal level. This preference emanated from the Framers' strong concern for the threat posed by "factions," those narrow interests acting contrary to the general public good and contrary to the rights of electoral minorities. The Constitution therefore embraces several substantive and procedural safeguards which filter naked majoritarian preferences directed at these groups. These filters balance the democratic principle of majority rule against the inherent dignity and autonomy of the individual.

A. The United States Constitution Guarantees Certain Substantive Rights Against the Rule of Majoritarian Will.

The Constitution prohibits the political branches of government from making or enforcing law which abrogates certain substantive rights guaranteed to the individual. These prohibitions place certain natural, civil, and political rights beyond the reach of an electoral majority who would curtail minority rights. "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Accord Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713, 736 (1964) ("[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be").

A few of these rights include: freedom of religion and speech (U.S. Const. amend. I), freedom from unreasonable governmental searches and seizures (U.S. Const. amend. IV), freedom from compelled self-incrimination (U.S. Const. amend. V), and the right to equal protection of the laws (U.S. Const. amend. XIV, §1, cl. 4). Further, all of these substantive guarantees prohibit violations by both the federal government and the state governments. See, e.g., Everson v. Bd. of Education, 330 U.S. 1 (1947) (freedom of religion); Martin v. Struthers, 319 U.S. 141 (1943) (freedom of speech); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (constitutional guarantee of equal protection which, by its terms, binds only the states applies with equal force to the federal government).

In sum, the United States Constitution protects minority[2] rights against both federal and state electoral majorities who would curtail those rights. Indeed, as James Madison noted, "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." J. Madison, To Thomas Jefferson, in 11 The Papers of James Madison 295, 298 (R. Rutkind & C. Hobson eds. 1977) (letter dated Oct. 17, 1788).

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[2] *Amicus* uses the term "minority" to refer generally to either an individual or an identifiable group of individuals who resist majoritarian will, as expressed by the exercise of legislative power. See The Federalist No. 51, at 351 (J. Madison) ("If a majority be united by a common interest, the rights of the minority will be insecure").

B. The United States Constitution also Guarantees Certain Processes Which, in turn, Protect Against the "Unfiltered" Rule of Majoritarian Will.

Besides prohibiting majoritarian excesses against certain recognized substantive rights, the Constitution also imposes certain procedural safeguards by which it curbs otherwise unfiltered majoritarianism. These processes evidence a preference against purely democratic lawmaking, placing the legislative power in the hands of the people's chosen representatives. In addition, the Constitution fragments and checks the representatives' delegated power in order to prevent the aggregation of (and, thereby, the abuse of) that power.

1. Representative Government

> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part . . . . If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist No. 51, *supra*, at 351.[3]

Article IV, Section 4 of the Constitution imposes on the "United States" an obligation to "guarantee to every State in this Union a Republican Form of Government." The Constitution does not

[3] This Court routinely references the Federalist Papers to discern the Framers' intended constitutional design and to comport present day decisions with that design. See, e.g., Hubbard v. United States, 115 S.Ct. 1754, 1763 (1995) (referring to The Federalist No. 78); United States v. Lopez, 115 S.Ct. 1624, 1626 (1995) (referring to The Federalist No. 45); Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447, 1454 (1995) (referring to The Federalist No. 48); Oregon Waste Systems, Inc. v. Oregon Dept. of Environmental Quality, 114 S.Ct. 1345, 1349 (1994) (referring to The Federalist No. 42).

require the states to embrace a "democratic" form of government, but a "republican" form of government. According to the principal author of this provision, James Madison, "democracy [consists] of a small number of citizens, who assemble and administer the government in person. [In contrast,] a Republic [is] a Government in which the scheme of representation takes place." The Federalist No. 10, at 61-62. Accordingly, the Republican Guarantee Clause imposes on the states the process of representative lawmaking in lieu of purely democratic lawmaking.

The Framers incorporated the guarantee of representative lawmaking into the Constitution to ensure that majoritarian factions do not sacrifice "the public good and the rights of other citizens" to their "ruling passion or interest." Id. at 60-61. Indeed, the Federalist Papers developed this theme quite clearly: "there are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament. . . . Government must provide "safeguard[s] against the tyranny of [such] passions." The Federalist No. 63, at 425 (J. Madison); see also The Federalist No. 49, at 343 (J. Madison) (government should regulate and control passions of public).

This Court, however, has generally adjudged the federal government's Republican Guarantee obligation nonjusticiable. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Cf. Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("*some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards") (emphasis supplied). However, *amicus* does not propose that purely democratic state lawmaking violates the Republican Guarantee or any other provision of the Constitution. Rather, the Republican Guarantee represents but one element of the Framers' vision of how American government would work and of how the rights guaranteed by the Constitution would be enforced. Since *at a minimum* the Republican Guarantee interposed a

procedural safeguard of minority rights against the tyranny of impassioned majority rule, *amicus* submits that the guarantee warrants a consideration of the minority-protective benefits of representative government whenever minority rights are burdened. In short, the Republican Guarantee does not invalidate direct initiatives.[4] Rather, the Republican Guarantee merely informs the nature of the judicial role with regard to direct initiatives which burden independently identifiable electoral minority groups.

2. Separation of Powers

> [I]f governmental power is fractionalized, . . . no man or group of men will be able to impose its unchecked will [on a minority].

United States v. Brown, 381 U.S. 437, 443 (1965).

The Constitution also filters majority will by dividing governmental authority so that no single governmental entity wields sufficient power to rule alone. Both the federal government and the state governments retain separate and distinct realms of power. Compare U.S. Const. art. I, §§8 and 10 with U.S. Const. amend. X. Further, each of the coordinate branches of the federal government act as a check on the others' use of governmental authority. Compare U.S. Const. arts. I, II and III. And, of particular significance to the question presented herein, this Court possesses the power to review state court decisions implicating federal law. Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). The Constitution diffuses power in this manner to make its oppressive use by government leaders as difficult as possible.

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[4] *Amicus* uses the term "direct initiative lawmaking" to refer only to lawmaking by the electorate without reference to elected legislative or executive actors. The term "referendum lawmaking," on the other hand, refers to complementary lawmaking both by the electorate and by elected representatives.

Because two or more governmental actors must essentially agree in order to effectuate the majority's will, the fragmentation of power among several constituencies limits the popular majority's ability to act in a unified, collective fashion. The Constitution's division of power, therefore, thwarts the many "interests and classes of citizens" such that the rights of individuals and minorities would be "in little danger from interested combinations of the majority." The Federalist No. 51, *supra*, at 324.

In sum, the Framers rejected simple majority rule because of their fear of unrestrained majoritarian factions. In its place they erected a representative structure which simultaneously enjoyed a relative detachment from and an ultimate accountability to the populace. And to ensure that neither detachment nor accountability got the upper hand, they separated and divided the centers of power. The role of this Court can only be assessed within the confines of this constitutional framework.

II. THIS COURT EVALUATES THE EFFICACY OF THESE FILTERS WHEN CONSIDERING CLAIMS BROUGHT UNDER THE FEDERAL EQUAL PROTECTION GUARANTEE

This Court accords a presumption of constitutionality to legislative enactments which pass through these filtering processes. Whenever these filters operate to effectively and fairly balance the imperative of majority rule against the constitutional mandate of equal application of the laws, this Court defers to the constitutional design and presumes no constitutional infirmity. When, however, these filters fail to fairly balance these concerns this Court does not defer to the legislative power. Rather, this Court subjects such legislation to heightened scrutiny to ensure compliance with the constitutional guarantee of equal protection.

A. The Constitution Imposes these Filters into Legislative Lawmaking, thereby Justifying this Court's Customary Presumption of Constitutionality

These process-based filters help improve the chances that legislation will fairly balance majority rule against minority rights. Representative government helps to moderate and restrain factious legislation in many ways. The Constitution's divided power scheme also prevents any concentration of power and any unconcerned unaccountability to minority rights. Accordingly, when these filters operate as the Framers intended, there is no reason for this Court to believe that minority rights have been unconstitutionally disregarded.

1. Representation Filters

This Court confers a presumption of constitutionality to legislative enactments out of respect for the filtering effect of representative government and its foundational principle that representative government guards against majoritarian excesses directed at electoral minorities. See The Federalist No. 51, *supra*, at 351 ("[i]f a majority be united by a common interest, the rights of the minority will be insecure"). First, representative government allows for deliberative, rather than imprudent, lawmaking. The legislative process includes time for discussion and confrontational debate, time for reflection and refinement of particular positions. In this way, deliberative lawmaking and the processes of debate and compromise moderate otherwise unrestrained legislation which may burden minorities. The Federalist No. 10, *supra*, at 59.

Second, a representative remains publicly accountable for the votes he takes on issues. To the extent the representative apprehends voter or party retribution for a vote against minority rights or to the extent the representative cannot publicly justify a vote against minority rights, the representative may vote otherwise.

Also, a representative may moderate anti-minority sentiments to avoid censure on the floor of the body by minority representatives.

Third, representative government compels an exposure to the views of others, including those of representatives from various electoral minority groups. Dialogue and exposure to minority representatives in turn reduce the likelihood that a representative will vote with animus against the minority group's interests because the knowledge and exposure gained through collaborative lawmaking effectively combat prejudice. In short, exposure to a minority group and its interests via exposure to minority representative helps to educate the non-minority representative and sensitize him to the group's rights and interests.

Fourth, a minority representative's membership on a legislative committee magnifies that representative's power to make policy. Because the committee's assent is necessary to send any proposal to the floor of the larger body, the minority representative can effectively impede legislation until the legislation addresses his concerns. In this way, the concerns of the minority group of which the representative is a member may be addressed and thereby protected. The legislature's committee structure also helps to protect minority rights through the hearing process. Hearings force proponents of both sides of an issue to air their views to a public audience, thereby helping to obstruct the enactment of unduly factious proposals.

Fifth, political parties play an integral part of the legislative process, helping to define and execute specific political agendas. Legislative members of a political party may vote to preserve minority rights against encroachment in accord with that agenda in the name of party loyalty or of political survival insured by party membership. To the extent a minority group's concerns resonate with a particular political party, that minority group may thereby amplify their voice in the legislative process.

Finally, the legislative process necessarily contemplates an

ongoing development of policy. If a particular representative works for success on a particular issue, he may promise cooperation on other issues such as minority rights in order to ensure success on his issue. To the extent, then, a representative needs the vote of a minority representative on a particular issue, he may vote in the minority's interests on other issues.

2. Separation of Powers Filters

This Court likewise confers a presumption of constitutionality to legislative enactments out of respect for the filtering effect of the Constitution's division of governmental power and its foundational principle that fragmented power prevents any single branch from becoming tyrannical. Ogden v. Saunders, 25 U.S. 213, 270 (1827) ("it is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt"). Because of this division of governmental power, the judiciary plays a limited, but necessary, role in enforcing the Constitution's balance between majority rule and minority rights.

First, although this Court's constitutional interpretations are supreme, they are not exclusive. Each officer of the political branches of government, both at the state and the federal level, also take an oath to conform his actions to the dictates of the federal Constitution. U.S. Const. art. VI, cl. 3. Presuming that each state and federal political officer abides by his constitutional oath, this Court may in turn reasonably presume that legislative enactments conform to constitutional requirements. See Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904) (legislatures are ultimate guardians of personal liberties to the same extent as the courts). See also Eakin v. Raub, 12 Serg. & Rawle 330, 350 (Pa. 1825) (Gibson, J., dissenting) (legislators have a superior capacity to judge the constitutionality of their own acts).

Second, state and federal legislatures employ larger staffs and command greater resources and deliberative opportunities to make sound, rational decisions regarding public policy. Courts do not. Courts only have limited staff, resources and time to resolve the limited-scope disputes brought before them. Accordingly, this Court confers a presumption of constitutionality to legislative enactments out of deference to the legislature's deliberative process because legislation sponsored by rational and disimpassioned fact-finding defies naked aggression against electoral minorities.

Third, the Constitution requires the approval of both houses of Congress to enact law. Further, the executive veto provision of Article I, §7 empowers the President to veto an act of Congress before it becomes law. That same provision empowers Congress to override that veto, but only by a two-thirds majority. In this way the Constitution divides the legislative power among several actors, thereby requiring broad-based support for new law. This Court presumes the constitutionality of legislation enacted pursuant to this fragmented power scheme in part because requiring a broader base of support lowers the probability that the law reflects majoritarian faction against minority rights. See The Federalist No. 10, *supra*, at 83 (requiring multi-party agreement makes it less probable that a majority of the whole will have a common motive to invade the rights of other citizens).

3. Deferential Equal Protection Review

Whenever this Court presumes the constitutionality of legislation, it employs the "rational basis" standard of review under the equal protection guarantee. Under that test, this Court sustains legislation whenever the distinctions drawn by the law are rationally related to some legitimate state interest. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

This deferential standard allows the states wide latitude "and the Constitution presumes that even improvident decisions *will*

eventually be rectified by the democratic processes." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (emphasis supplied). In short, whenever legislation passes through the procedural filters designed to balance majority rule against minority rights, this Court presumes the constitutionality of the legislation and generally sustains it because these processes rectify, or filter, otherwise improvident decisions.

B. When, however, These Filters Fail to Work Properly, this Court Withholds the Presumption of Constitutionality and Rigorously Scrutinizes the Legislation Enacted Thereby

These procedural filters work most of the time; they do, however, sometimes fail. Pursuant to the Fourteenth Amendment's Equal Protection guarantee, this Court evaluates the efficacy of these political processes in balancing the imperative of majority rule against minority rights. In United States v. Carolene Products Co., 304 U.S. 144 (1938), this Court first articulated the framework by which it would (and today does) review the exercise of governmental power in this regard. In that opinion, Justice Stone wrote and foretold that:

> [t]here may be a narrower scope for operation of the presumption of constitutionality [accorded to] . . . legislation *which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation* [thereby] subject[ing such legislation] to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . [Further,] prejudice against discrete and insular minorities may be a special condition, *which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities*, . . . call[ing] for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (emphasis supplied).

Accordingly, by reference to those decisions which affirmed Justice Stone's vision, this Court rigorously evaluates state laws enacted under a restricted or curtailed operation of those "political processes ordinarily to be relied upon to bring about repeal of undesirable legislation [or] to protect minorities." See, e.g., Hunter v. Erickson, 393 U.S. 385 (1969) (Equal Protection guarantee invalidates state political structures which allocate political power on the basis of non-neutral principles).

Those decisions developed the procedure by which this Court today evaluates the efficacy of these political processes. In accordance with Carolene Products, this Court will suspect that these political processes have not operated according to design, thereby calling for a more intense judicial filtering role, whenever it suspects that (1) prejudice against a "discrete and insular" minority group imposed itself into the legislative process (see McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (invidious discrimination targeted at certain electoral minority groups is unlikely to be soon rectified by legislative means, thereby mandating heightened judicial review)) or (2) whenever legislation burdens some identifiable constitutional protection (see Kramer v. Union Free School District No. 15, 395 U.S. 621, 626 (1969) (any unjustified discrimination in determining who may vote undermines the legitimacy of representative government)). In either case, the defendant can overcome the Court's suspicion by showing that the government found it necessary to impose the statute's burdens in an inequitable manner in order to achieve some weighty state interest. See, e.g., id.

In short, the state prevails whenever it shows that the filters did not break down, but that the government by necessity sacrificed minority rights for some relatively greater good. When, however, state lawmaking processes unduly restrict these filtering processes resulting in legislation which arbitrarily burdens minority rights in the service of some less than important or even illegitimate state interest, this Court invalidates the law in accordance with the Fourteenth Amendment's Equal Protection guarantee.

III. FACIALLY DISCRIMINATORY DIRECT INITIATIVES WHOLLY BYPASS THESE VERY POLITICAL PROCESSES AND THEREFORE SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY

Direct initiative lawmaking targeted at an independently identifiable minority group deserves no presumption of constitutionality because it affords no opportunity to balance majority rule against the minority rights burdened. Indeed, direct initiatives wholly bypass the constitutional filters the normal operation of which confer the presumption of constitutionality. Accordingly, this Court should decline to presume the constitutionality of the direct initiative at issue and thereby stand in the stead of the bypassed filters.

A. Direct Initiative Lawmaking, such as that Used in the Passage of Amendment 2, Fails to Balance Majority Rule Against Minority Rights.

Direct initiative lawmaking which targets minority participation in the political process, such as that used in the passage of Amendment 2, cannot fairly be said to balance majority rule against minority rights. Direct lawmaking fails to provide for the moderating and minority-protective effects of representative government. It also consolidates the legislative power in one actor since in the direct initiative process the people assume the legislative power without the threat of veto. Accordingly, these filters have not even been given a chance to work as intended, thereby depriving this Court with any reason to presume that minority rights have been adequately safeguarded in this case.r

1. Representation Filters

Direct initiative lawmaking rejects each of the minority-protective features conferred by representative government. First,

direct initiative lawmaking does not allow for deliberation. Rather, direct initiatives merely aggregate a majority on one side and a minority on the other, awarding the legislative prize to the majority. There is no compelled occasion for discussion and debate and, in practical terms, relatively little time for reflection and refinement of particular positions. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, 22 Urb.L.Rev. 135, 140-141 (1981) (when issues presented to the public are clear-cut and emotional, the prevalence of emotional fervor may result in "a reduction in the care with which voters evaluate the issues"). Further, manipulative advertising campaigns abound in the direct initiative process, oversimplifying the issues and appealing to the electorate's worst instincts. In short, there is little about direct initiative lawmaking which moderates otherwise unrestrained legislation burdening minority rights in the manner the Framers intended for legislation to be moderated.

Second, the majority voter accounts to no one for his vote (nor, because of the fundamental nature of the right to vote, should he). The majority voter/lawmaker need not be informed on the merits of an issue and may vote however irrationally he wishes to. While the public nature of anti-minority sentiments may moderate a representative's statements and votes, the private nature of the voting booth secures naked majoritarianism from the scrutiny of public exposure.

Third, the direct initiative process provides no direct opportunity for the majority voter to face and encounter the minority member whose rights are at issue. Accordingly, the process affords no opportunity for the minority voter to sensitize the majority voter to the nature and importance of the rights at issue. In a representative system, the minority may directly approach the relatively few legislators deciding a question and attempt to persuade them in his favor. See, e.g., Boulder, Colo., Rev. Code §§12-1-2 to -4 (1987) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation). The direct ballot system rejects such

opportunities.

Fourth, in stark contrast to a representative system of legislative committees, the direct initiative system dilutes minority voting strength much in the same manner as at-large elections. The minority voter/lawmaker's vote poses little threat to the ballot box success of a majority voter/lawmaker's interests. Indeed, rather than seek to work and compromise with the minority voter/lawmaker, the majority voter only wishes to quell the minority's objections.

Fifth, political parties play only a minor role in direct initiative lawmaking. They rarely take a stand on ballot measures and, in any event, do not retain the same degree of persuasion over the majority voter/lawmaker as they do over the representative. Because of this, the aggregation of minority voices and advocates in political parties impacts little the direct initiative process.

Finally, direct initiatives are a one-shot, winner-take-all means by which the electorate decides an isolated issue. Direct initiatives do not contemplate an ongoing development of public policy in general. The majority voter, then, never confronts and, indeed, never has to consider, an exchange of support now for another's support later. Although a representative must consider the views of his colleagues, majoritarian preferences cannot be reached by, much less moderated by, the idea of political compromise.

According to the Framers' design, the representative structure guarantees certain institutional mechanisms by which minority rights receive protection. In clear disregard for the Framers' vision that representative government captures the accountability of popular government and filters out its vices, direct initiative lawmaking rejects each of these mechanisms as either unnecessary or counter-productive. Accordingly, there is no reason for this Court to believe that minority rights have been adequately protected and that its filtering role is not needed.

2. Separation of Powers Filters

The direct initiative process consolidates broad governmental power in only one actor. Concentrated governmental power only invites tyranny and provides no opportunity to balance such power against minority rights. The direct initiative process dissuades against a presumption of constitutionality on this basis for several reasons. First, the Constitution binds only public officers with the duty to obey and conform their acts to its mandates. The Constitution imposes no such duty on the electorate. Moreover, when an initiative issue directs voters' attention along highly emotional lines, intuition suggests that an electorate not charged with the duty to respect constitutional boundaries may disregard such considerations altogether. Accordingly, unlike under our representative system, there is no reason for this Court to presume that by the time the legislation reaches the court, it had already been screened for constitutionality.

Second, unlike our legislatures, the electorate does not necessarily engage in the business of fact-finding and supporting its voting decisions with rational arguments regarding public policy, especially on highly emotional issues like minority rights. The electorate lacks the time, resources, and staff necessary for this task. Moreover, unlike our legislatures, the electorate cannot invite and expect expert advice on the issues raised in a direct initiative. The electorate's naked preferences, then, do not pass through the filter which necessarily requires consideration of rational and disimpassioned lawmaking. Accordingly, there is no reason for this Court to presume the rationality of the electorate's choice to expressly burden minority rights.

Finally, unlike the divided power design, the direct initiative process does not seek broad-based consensus on any particular issue, only a simple majority. Direct initiative lawmaking therefore heightens the risk that the legislative power will be exercised only by a factious majority acting for its own good rather than the whole of society, including society's minorities. Indeed,

Amendment 2 passed by a mere majority of 6.8% of the total votes cast. See Romer v. Evans, 854 P.2d 1270, 1272 (Colo. 1993). Accordingly, there is no reason for this Court to presume that the vote did not reflect a majoritarian faction against minority rights. See The Federalist No. 10, *supra*, at 83 (requiring multi-party agreement makes it less probable that a majority of the whole will have a common motive to invade the rights of other citizens).

B. Accordingly, this Court should not Presume Amendment 2 Constitutional but should Subject Amendment 2 to Heightened Scrutiny.

Since direct initiative lawmaking, such as that used in the passage of Amendment 2, deprives this Court of any basis upon which it may presume that majoritarian rule and minority rights have each independently and simultaneously been given due regard, this Court should withhold the usual presumption of constitutionality from its review of the legislation enacted thereby. By this suggestion, *amicus* does not propose that the process of purely democratic state lawmaking violates any provision of the Constitution. See James v. Valtierra, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice"). See also discussion beginning *supra* page 4 (the Constitution does not invalidate direct initiative lawmaking but merely informs the nature of the judicial role with regard to direct initiatives which burden independently identifiable electoral minority groups). Rather, *amicus* proposes that

(1) direct initiative lawmaking does not immunize legislation adopted thereby from judicial review (see Lucas, *supra*, 377 U.S. at 736-737 ("the fact that [legislation] is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act"));

(2) the federal constitutional guarantee to equal protection of the

laws presumes the existence of certain constitutionally- designed political processes which filter otherwise unrestrained majority rule (see Cleburne, *supra*, 473 U.S. at 440 (the Constitution presumes that even improvident legislative decisions will eventually be rectified by the democratic processes");

(3) this Court therefore enforces that guarantee by reference to the relative efficacy of these political processes in particular legislative settings (see Carolene Products Co., *supra*, 304 U.S. at 152 n.4);

(4) normally, legislation enacted by due reference to these political process raises no concern that these process have been restricted or curtailed (see Vance v. Bradley, 440 U.S. 93, 97 (1979) (there is no reason to infer antipathy when these political processes function properly);

(5) this Court has identified two "clues" by which it suspects that these political processes have been unduly restricted in the protection of minority rights: (a) suspect class (see McLaughlin, *supra*, 379 U.S. at 192 (invidious discrimination targeted at certain electoral minority groups is unlikely to be soon rectified by legislative means, thereby mandating heightened judicial review)) and (b) fundamental rights (see Kramer, *supra*, 395 U.S. at 626 (any unjustified discrimination in determining who may vote undermines the legitimacy of representative government));

(6) whenever this Court suspects that these political processes have been somehow curtailed, it scrutinizes the statute enacted thereby more closely to ensure that it rationally comports with the equal protection guarantee (see Cleburne, *supra*, 473 U.S. at 451-455 (Stevens, J., concurring) (all equal protection analysis asks the same question: could an impartial lawmaker logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class)); i.e., that it does not represent a legislative view that those in the burdened class are not as worthy or deserving as others (id. at 440 (White, J., for the Court);

(7) in contrast to the traditional standards of equal protection review, review of direct initiative lawmaking presents an opportunity by which this Court need not refer to "clues" or "suspicion" that the political processes have not worked to safeguard minority rights against majoritarian excesses; rather, *by its own express design* direct initiative lawmaking wholly bypasses these processes and affords no meaningful opportunity by which majority rule may be balanced against targeted minority rights; and

(8) therefore, absent any reason to presume that the legislation balances majority rule against minority rights, this Court should more closely scrutinize laws like Amendment 2 which pass by direct initiative and which expressly burden an independently identifiable and historically unpopular minority group.

In subjecting Amendment 2 to heightened scrutiny, this Court merely intensifies its filtering role for the unfiltered process Amendment 2 represents.[5] The positive need for a judicial filter is perhaps best expressed by stark analogy. In 1913, the people of Colorado amended their state constitution to prohibit judicial invalidation of direct legislation. See Colo. Const. art. 6, §1 (repealed). The people made the restriction applicable to the lower state courts only, however. Id. Why did the people fail to prohibit *all* judicial review of direct initiatives? Did they recognize the need for a judicial filter, or a review of the constitutionality of direct initiatives? Would a state constitutional amendment which *does* prohibit all state judicial review of direct initiatives pass federal constitutional muster? If so, would this Court subject legislation enacted thereby to merely rational basis review?

The instinctive answers to these latter questions is "no, certainly not." However, the Constitution permits states wide latitude in structuring their respective governments. See, e.g., Neb. Const. art. III, §1 (defining Nebraska's unicameral legislature). See also

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[5] This statement of course presumes a *de novo* review by this Court of the constitutional issues raised in this case.

Luther, *supra*, 48 U.S. at 47 ("the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure"). What if, though, a majority of statewide voters operating under a state constitution which prohibits state judicial review of direct initiatives had voted to deprive all citizens with blue eyes the right to life, unarguably the most "fundamental" of all rights. U.S. Const. amend. XIV, §1, cl. 3 ("nor shall any State deprive any person of life . . . without due process of law"). Without state judicial review for the constitutionality of such an initiative, there would be no state-sponsored impediment preventing the state executive from faithfully executing the laws and enforcing the elimination of all citizens with blue eyes.

The obvious response to this concededly extreme hypothetical is, of course, that the federal judiciary enforces the fundamental federal constitutional right to life against undue state encroachment. But, if states are permitted wide latitude in structuring their state governments, could a state electorate also enact a state constitutional amendment which prohibits both state *and federal* judicial review of direct initiatives? The answer to this hypothetical seems beyond reasonable argument: because of the federal judiciary's primary obligation to enforce federal constitutional rights imposed against undue state encroachment and because of the relative supremacy of federal constitutional rights, a state may not enact a state constitutional amendment to prohibit all judicial review of direct initiatives and consequently expect the federal judiciary to respect that law when a direct initiative raises meaningful questions of federal constitutional rights. See U.S. Const. art. VI, §2 ("This Constitution . . . shall be the supreme Law of the Land" superseding contrary state constitutional provisions). See also U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1854 (1995) (the states may unquestionably retain a significant measure of sovereign authority, limited by that which the federal Constitution has not divested them).

The central point which may be gleaned from all of these

questions is that if this Court does not abdicate its responsibility to review absolutely unfiltered legislation for federal constitutional compliance, there is some substantive truth to the theory that unfiltered legislation warrants a more searching judicial inquiry. In turn, if there is some substance to this theory and if the judicial review filter is the only filter imposed upon the ultimate ratification of a statewide direct initiative which unfairly burdens a particular and unpopular minority group, should this Court merely presume the constitutionality of such an initiative; or, should it subject the initiative to some form of vigorous review to make up for the absence of the other constitutionally-designed filters? *Amicus* respectfully suggests the latter.

IV. BECAUSE THIS COURT SHOULD SUBJECT AMENDMENT 2 TO HEIGHTENED SCRUTINY, BY PETITIONERS' OWN CONCESSION, WELL-SETTLED PRINCIPLES OF EQUAL PROTECTION INVALIDATE AMENDMENT 2.

Petitioners assert that this Court may not disturb a state's power to allocate authority between its own political subdivisions absent some compelling reason to do so; i.e., absent some reason to apply heightened judicial scrutiny.[6] *Amicus* submits that Amendment 2's adoption by a process which never balanced majority rule against a due regard for minority rights represents such a compelling reason. Accordingly, by petitioner's own concession, Amendment 2 should be evaluated in light of this Court's decisions which apply heightened scrutiny to those laws which restructure the political processes and thereby impose a virtually impervious barrier on a particular minority group and on no one else.

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[6] Petitioners fundamentally mischaracterize Amendment 2. Amendment 2 precludes the State of Colorado through any of its institutions from protecting gays and lesbians from discrimination, including by action of the state legislature or the executive.

A. Petitioners Argue that this Court may not Disturb Amendment 2 Absent the Imposition of Some Form of Heightened Judicial Scrutiny.

Petitioners assert that "heightened [judicial] scrutiny is almost never appropriate where, as here, the challenged state action goes to the heart of state sovereignty. Thus, on its face, Amendment 2 carries with it a strong presumption of constitutionality." Brief for Petitioners at 10. They further charge that "[u]nder Hunter [*supra*] and its progeny, the Equal Protection Clause only prohibits efforts to realign the political process in a manner designed to harm a racial minority." Id. at 19. Petitioners expend much effort to defend a position that Hunter applies only in race cases and that Hunter did not recognize a fundamental right against state action to "disadvantage any particular group by making it more difficult to enact legislation on its behalf." Id. at 18-39 (*referring to* Hunter, *supra*, 393 U.S. at 393).

Petitioners' argument elevates theoretical form over constitutional substance by strictly formalizing this Court's suspect class theory and fundamental rights theory. Petitioners suggest that unless and only unless this Court perceives these two factors, there is no need for heightened judicial scrutiny. These two factors, however, merely act as clues to which this Court looks to determine the efficacy of those political processes ordinarily to be relied upon to protect minorities. Because a legislative burden on a pre-defined suspect class or on a fundamental right rarely relates to the achievement of any legitimate state interest, this Court considers these two factors as indicators that the political processes have been restricted and failed to properly advance a due regard of minority rights.

In short, petitioners ignore the constitutional substance of Carolene Products' reference to "political processes" and instead rely only on the formulaic theories developed in Carolene Products' progeny. Petitioners therefore would have this Court proceed along a line of reasoning and simultaneously ignore the

very foundation of that line of reasoning. However, rather than look for clues and having to suspect that heightened scrutiny is required, *amicus* respectfully submits that this Court should recognize that Amendment 2 passed without any reference to the political processes ordinarily to be relied upon to protect minorities. For that reason alone, this Court should sharpen its filtering role in its review of Amendment 2 and thereby subject Amendment 2 to a more rigorous degree of scrutiny. Accordingly, this Court should recognize petitioners' argument for what it is: a concession that unless this Court subjects Amendment 2 to heightened scrutiny (or, in petitioners' simply formulaic terms, unless Amendment 2 burdens either a suspect class or fundamental right) there is no need to disturb Amendment 2's intended effect.

B. Amendment 2 Requires Heightened Scrutiny by this Court; Assuming, *arguendo*, the Accuracy of Petitioners' Argument, Amendment 2 Must Fail.

But, *amicus* has persuasively demonstrated that because of the process by which Amendment 2 was adopted, this Court should subject Amendment 2 to a more rigorous degree of scrutiny than that normally associated with its review of legislation which carries a presumption of constitutionality. Accordingly, even if this Court accepts petitioners' premise argument,[7] it should apply those decisions which, in a heightened scrutiny context, evaluate structural changes in the political process which impose a virtually impervious barrier on a particular minority group and on no one else.

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[7] *Amicus* suggests that the Colorado Supreme Court's fundamental rights theory (see Romer v. Evans, 854 P.2d 1270, 1272 (Colo. 1993)), and *amicus* Human Rights Campaign Fund's suspect class theory also suggest equally valid analyses in this case.

C. Hunter v. Erickson and its Progeny Invalidate State Allocations of Political Power Achieved on the Basis of a Non-Neutral, Group-Specific Principle.

The seminal case on which the Colorado Supreme Court relied, Hunter v. Erickson, 393 U.S. 385 (1969), invokes the equal protection guarantee to invalidate state political structures which allocate political power on the basis of non-neutral principles. In Hunter, the Akron, Ohio, city council adopted a fair housing ordinance which prohibited housing discrimination on the basis of race, color, religion, ancestry, or national origin. In response to that ordinance, the Akron electorate amended the city charter by direct initiative to repeal the fair housing ordinance and to prohibit any future ordinance dealing with group-based discrimination in housing, unless it had first been approved by a majority of the voters. This Court held that this charter amendment violated the equal protection guarantee because it clearly made it more difficult to enact antidiscrimination ordinances than to enact other types of ordinances. Id. at 393. The Court recognized that equal protection prohibits the reallocation of governmental decisionmaking power to impose special burdens on minorities within that process. Id. at 391.

Justices Harlan and Stewart concurred separately to the majority opinion on the basis that equal protection prohibits the allocation of governmental power on the basis of any non-neutral principle. Id. at 393-396. The concurring justices first contrasted such restructurings with those political restructurings which provide a just framework within which the diverse political groups in our society may fairly compete. Id. ("If a governmental institution is to be fair, one group cannot always be expected to win"). The justices then identified the Akron ordinance as one in which minorities were saddled with special burdens to equal participation in the political process. Id. ("the city of Akron has not attempted to allocate governmental power on the basis of any general principle").

Thirteen years later, this Court used Hunter on the same day in June, 1982, to decide two very different decisions in two very similar cases. See Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982). Both cases involved the Court's review of statewide electoral lawmaking designed to curb mandatory school busing to achieve racial balance. In Seattle School District, the initiative prohibited school districts from requiring any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence. 458 U.S. at 462. The initiative allowed busing for reasons none of which referred to race. Id. at 470-484. This Court voted 5-4 to invalidate the statewide vote, finding that the initiative altered the structure of governmental decisionmaking and thereby cast unequal burdens on a suspect class. Id. at 485-487. In Crawford, the statewide vote stripped state courts of the power to order busing except in cases of Fourteenth Amendment violations. 458 U.S. at 527. In that case, this Court voted 8-1 to uphold the statewide vote, finding that the law simply repealed the right to invoke a particular remedy; it did not work a structural change in the political process. Id. at 546-547 (Blackmun, J., concurring).[8]

Though seemingly irreconcilable, this Court bound all of these cases with a singular and principled thread: the legislative power, whether exercised by the legislature or by the people, may not single out for peculiar and disadvantageous treatment those political processes or decisionmaking mechanisms used to protect minority rights and interests. Id. (Blackmun, J., concurring) (*citing* Seattle School District, *supra*, 458 U.S. at 458). This Court adheres to the principle that the legislative power, whether exercised by the legislature or by the people, may not restructure the political processes according to any non-neutral, group-specific principle.

[8] Justice Blackmun, concurring in Crawford, authored the Opinion of the Court in Seattle School District. Justice Blackmun wrote separately in Crawford to distinguish his seemingly opposing votes in the two cases.

Seattle School District, *supra*, 458 U.S. at 470.

In the instant case, the Colorado electorate adopted Amendment 2 which not only repealed then-existing antidiscrimination laws protecting gays and lesbians, but also prohibited any state governmental entity from adopting similar laws in the future unless the state constitution is again amended to permit such measures. Amendment 2 therefore unambiguously alters the state political process with sole reference to Colorado's gays and lesbians, prohibiting them from obtaining legislation in their favor absent the consent of a majority of the statewide electorate through the adoption of a state constitutional amendment. Rather than merely repealing the then-existing antidiscrimination laws, Amendment 2 went one step further and fundamentally reallocated political power along a non-neutral, group-specific principle. No other independently identifiable electoral minority faces such a burden and no other group's access to the mere chance to persuade political power in its favor is restricted. In accordance with this Court's decisions in Hunter, Seattle School District, and Crawford, *supra*, this Court should invalidate Amendment 2. The federal equal protection guarantee requires no less.

CONCLUSION

WHEREFORE, the judgment of the Supreme Court of Colorado should be affirmed.

Dated: June 19, 1995.

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IN THE

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OCTOBER TERM, 1994

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

BRIEF OF THE COLORADO BAR ASSOCIATION, OTHER STATE AND LOCAL BAR ASSOCIATIONS AND VARIOUS NATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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34pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. EQUAL ACCESS TO THE POLITICAL PROCESS IS FUNDAMENTAL TO OUR CONSTITUTIONAL SYSTEM 6

II. THIS COURT HAS RECOGNIZED A RIGHT OF EQUAL POLITICAL PARTICIPATION WHICH INCLUDES, BUT IS NOT LIMITED TO, THE RIGHT TO VOTE 10

A. The Right to Vote Is Part of a Broader Right 11

B. Principles Recognized by This Court in *Hunter*, *Seattle School District* and *Gordon* Support the Existence of a Right to Equal Participation in the Political Process 14

III. AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY DEPRIVING AN INDEPENDENTLY IDENTIFIABLE GROUP OF CITIZENS OF EQUAL PARTICIPATION IN THE PROCESSES OF GOVERNMENT 19

A. Individuals, Not Issues 21

B. "Independently" Identifiable 23

C. Process, Not Outcome 24

CONCLUSION 26

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Celebrezze, 460 U.S. 780 (1983) 11, 18
Avery v. Midland County, 390 U.S. 474 (1968).....11, 15
Baker v. Carr, 369 U.S. 186 (1962) 14, 20
Board of Estimate v. Morris, 489 U.S. 688 (1989) 12
Burdick v. Takushi, 504 U.S. 428 (1992).....18
Carrington v. Rash, 380 U.S. 89 (1965) 11, 21, 26
Crawford v. Board of Education, 458 U.S. 527 (1982).....16
Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) 9
Davis v. Bandemer, 478 U.S. 109 (1986) 20
Dunn v. Blumstein, 405 U.S. 330 (1972) 11
Evans v. Romer, 854 P.2d 1270 (Colo. 1993) 12, 15, 17
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 11, 26
Gordon v. Lance, 403 U.S. 1 (1971) .....*passim*
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 11, 21
Hunter v. Erickson, 393 U.S. 385 (1969) .....*passim*
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 11
James v. Valtierra, 402 U.S. 137 (1971) 16, 17
Keller v. State Bar, 496 U.S. 1 (1990) 25
Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) 6, 11, 17, 21
Lance v. Board of Education, 170 S.E.2d 783 (W. Va. 1969) 17
Lucas v. Forty-Fourth Colo. Gen. Assembly, 377 U.S. 713 (1964) 11, 22
Moore v. City of East Cleveland, 431 U.S. 494 (1977).....13
Railway Express Agency v. New York, 336 U.S. 106 (1949) 9

Cases

Page

Reynolds v. Sims, 377 U.S. 533 (1964) .....*passim*
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 12
Thornburgh v. American College of Obst. and Gyn., 476 U.S. 747 (1986) 13
Thornhill v. Alabama, 310 U.S. 88 (1940) 12
United States v. Carolene Products Co., 304 U.S. 144 (1938) 4, 6, 7, 13, 14
Vance v. Bradley, 440 U.S. 93 (1979).....19
Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) .....*passim*
Wesberry v. Sanders, 376 U.S. 1 (1964).....17
Whitcomb v. Chavis, 403 U.S. 124 (1971) 11, 12
White v. Regester, 412 U.S. 755 (1973) 11
Williams v. Rhodes, 393 U.S. 23 (1968) 11, 12

Constitutions and Statutes

U.S. Const. art. V.....8
U.S. Const. amend. I 18
U.S. Const. amend. XIV .....*passim*

TABLE OF AUTHORITIES

Other Authorities

Page

Alexander Bickel, *The Least Dangerous Branch* (1962) 10

Robert Dahl, *A Preface to Democratic Theory* (1956) 8

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Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747 (1991) 14

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The Federalist No. 10 (James Madison) 8

The Federalist No. 51 (James Madison) 8

5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 203 (Elliott ed., 1941) 8

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF THE COLORADO BAR ASSOCIATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

Amici are bar associations and other organizations from across the country that are deeply concerned with and affected by Colorado's Amendment 2. *Amici* include the State Bar of Arizona, Colorado Bar Association, Connecticut Bar Association, Delaware State Bar Association, Florida Association for Women Lawyers, Illinois State Bar Association, Kansas Bar Association, Maine State Bar Association, Massachusetts Bar Association, Minnesota State Bar Association, Minnesota Women Lawyers, State Bar of Montana, Women's Law Section, New Jersey State

Bar Association, New Mexico Women's Bar Association, New York County Lawyers' Association, Oregon State Bar, Vermont Bar Association, and the State Bar of Wisconsin, Individual Rights Section. Each bar association *amicus* has a strong interest in ensuring its ability to adopt and enforce, or to support the adoption and enforcement of, ethical canons and codes of professional conduct prohibiting discrimination of all kinds in the judicial process and in the provision of legal services. The discriminatory effects of enactments like Colorado's Amendment 2 directly threaten these interests by restricting the ability of bar associations and their members to adopt and enforce, or to support the adoption and enforcement of, anti-discrimination provisions in their respective states and, in the case of integrated bar associations, from adopting and enforcing, within the associations themselves, anti-discrimination measures protecting gay men and lesbians.

Amici also include several national organizations dedicated to the preservation of open and effective government, the protection of civil and constitutional rights, and the adoption and enforcement of laws prohibiting arbitrary discrimination, including discrimination on the basis of sexual orientation. The national *amicus* organizations include the Society of American Law Teachers, Common Cause, and People for the American Way.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in Appendix A.

INTRODUCTION

Blacks and Jews, along with farmers, smokers, joggers and redheads, can obtain protection against discrimination from the Colorado legislature, executive departments, courts, and the many state and local "agencies, branches, subdivisions and departments" that exercise governmental power. As a result of Amendment 2, lesbians and gay men cannot. The question

presented by this case is whether it is constitutional for Colorado to reconfigure the process of government in this fashion.

For petitioners that is an easy question: States possess the power to organize their political system in any manner a majority of their citizens support on any issue, provided only that no one is denied the vote and that the rights of certain constitutionally recognized "suspect classes" are protected. Any other result, say petitioners, would not only infringe upon a state's prerogatives in our federal system, but would propel the process of popular government down a hopelessly slippery slope of special interest challenges to majority rights.

Amici submit that this argument is fundamentally misdirected. This lawsuit is not about slippery slopes, but about level playing fields. It is not about the right of the people of Colorado, acting through established channels of political expression and representation, to enact or refuse to enact legislation on particular *issues*. Rather, it is about their asserted right to place roadblocks in the path of particular *individuals* in order to impede their ability to participate on even terms in the processes by which political issues are addressed.

No "breathtaking"[1] or "revolutionary"[2] principles need be established to protect the right to a fair political process. Nor does its recognition do "profound violence"[3] to the majority's right to allocate governmental power and to prevail after a fair fight. To the contrary, equality of participation in the political process is inherent in the concept of equal protection and should be far less controversial than the often divisive "class"-based analysis that is central to much equal protection jurisprudence.

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[1] Brief for Petitioners at 34 ("Pet. Br.").

[2] Pet. Br. at 10.

[3] *Id.*

SUMMARY OF ARGUMENT

1. The political branches ordinarily control the division and exercise of governmental power and resources. So long as the process of government is not compromised, courts rarely have a role to play in second-guessing the judgments of the people or their elected representatives. However, where the process itself "malfunctions," the basic premise of political legitimacy is called into question and a more active form of judicial review is necessary. *See* John H. Ely, *Democracy and Distrust* 103 (1980).

2. There are two principal situations in which such a malfunction occurs. The first is where laws disadvantage "discrete and insular minorities." The second is where legislation "restricts [the] political process[]" itself. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The former may be a more familiar aspect of equal protection jurisprudence, but it is no more important on that account. Indeed, if anything can be said to be inherent in the concept of equal protection, it is that the ordinary channels for seeking "protection of the laws" should remain open to all on an equal basis. Specifically, *amici* submit that under the Equal Protection Clause states may not deny particular individuals equal access to the regularly-established, ongoing *processes* of government.

3. The right of citizens to participate in those processes on an equal footing — the right to vote, the right to be represented in a republican form of government, the right to seek legislation or petition the government for redress of grievances — is a core democratic value that has been "inferred" from the structure and traditions of our democratic system. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964). That right is not defined, but *effectuated*, by the right to cast an effective ballot. *Id.* at 565.

4. Equal political participation can be denied not only by interference with the right to vote, but also by manipulation of the structure of the legislative process. Creating a two-tier system in which certain people are singled out and subjected to a uniquely onerous process for seeking to protect their interests violates those individuals' rights to equal protection to the same extent as laws

diluting the effectiveness of particular citizens' votes. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Reynolds*, 377 U.S. at 568.

5. The right to a fair political process is entirely distinct from the outcome of that process. Government action typically benefits some people while burdening others. It is precisely because this is so that states are prohibited from disabling any particular group of people from equal access to the processes by which the political distribution of such burdens and benefits is resolved. Laws dealing with a particular issue (*e.g.*, fair housing or trout fishing) do not raise an equal protection issue merely because they disproportionately affect particular individuals. On the other hand, a law which on its face simply makes it harder for a certain identified class of people to participate in the processes of day-to-day government stands on a very different constitutional footing. Such an arrangement offends equal protection of the laws regardless of whether those whom it subordinates are a so-called "suspect class."

6. The right of individuals to equal participation in the political process is not at stake where the disadvantaged class can be identified only by reference to its position on a particular matter. The concept of an "*independently* identifiable group" neatly captures the notion that equal protection extends to individuals who are identifiable apart from their views on a particular issue. Thus, a law making employment rights generally a matter of state, rather than local, concern would not raise equal protection concerns, whereas a law making the employment rights of smokers or people with blue eyes a matter of exclusive state concern would.

7. Petitioners err in asserting that the right to equal process is excessively broad or that recognizing it would fundamentally reorder the relationship between majority and minority rights. To the contrary, recognizing that everyone has a claim to participate on equal terms in seeking the protection of the laws will have no effect upon the vast majority of legislation (and other governmental action) which has nothing to do with process. Moreover, nothing prohibits a state from allocating power as it sees fit so long as it does not do so in a manner that singles out particular citizens and makes it more difficult for them, alone, to achieve political success.

8. Placing obstacles in the path of particular citizens in order to deprive them of an equal opportunity to protect their interests through the political process is a particularly pernicious form of discrimination because it flagrantly contradicts one of the most fundamental precepts of this nation's constitutional system: that, in politics, we all ought to play by the same rules and "may the best person win." When one group must run farther or surmount higher barricades to reach the same point, the system itself is unacceptably corrupted.

ARGUMENT

I. EQUAL ACCESS TO THE POLITICAL PROCESS IS FUNDAMENTAL TO OUR CONSTITUTIONAL SYSTEM.

Amici and petitioners begin at a common point: Our constitutional system relies principally upon the electorate and the political branches of government to make decisions and determine policy — to allocate benefits and impose burdens. Within broad limits, the courts have only a restricted role to play in superintending the decisions of these political branches. The fact that the government "sometimes generates outcomes with which we disagree" does not give rise to a claim for judicial intervention. *See* Ely, *supra*, at 103.

However, the assumption on which this "default system" operates is that the institutions of government are structured and function "so as to represent fairly all of the people." *Id.* at 117 (quoting *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627-28 (1969)). When that assumption does not hold, *i.e.*, "when the challenge . . . is in effect a challenge [to] this basic assumption" itself the "assumption can no longer serve as the basis for presuming constitutionality." *Id.*

There are essentially two such situations. They are the ones identified by Justice Stone in his famous footnote four in *Carolene Products:*

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4 (citations omitted).

Justice Stone's concern with laws that disadvantage "discrete and insular minorities" — what are now more commonly referred to as "suspect classes" — has become a primary focus of equal protection jurisprudence. However, his concern about "legislation which restricts [the] political processes" is equally important.[4]

The notion that constitutional government rests on the fairness of the political process is scarcely novel, or recent. In fact, the particular genius of James Madison and the other architects of the Constitution was to focus intently upon the process by which successive governments would be selected and, once chosen, how they would represent the people who elected them. *See* Ely, *supra*, at 77-82.

The cornerstone of the system created by the framers, of course, is the principle of majority rule. Indeed, one of the driving factors behind the American Revolution was the perceived tyranny of English rule in which power was exercised by a few, from afar. However, the framers also recognized that tyranny could be imposed on minorities by the majority. As Alexander Hamilton put it succinctly in the ratification debates: "Give all power to the many, they will oppress the few. Give all power to the few, they

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[4] In fact, it was at first the more readily accepted portion of Justice Stone's formulation. *See* Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093, 1103-04 (1982).

will oppress the many."[5] *See also The Federalist No. 51*, at 323 (James Madison) (Mentor ed., 1961) ("It is of great importance . . . not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

The framers understood that unfettered exercise of majority will, especially at the point of fashioning constitutive arrangements for governance,[6] would not only jeopardize the rights of minorities, it would threaten the integrity and stability of our constitutional system. Obviously, a majority could use its numerical power to grant unequal benefits to itself or impose unequal burdens on a minority. Even more dangerous, however, was the possibility that a majority would fix the very *structure* of government to ensure its own perpetual dominance or at least the perpetual subordination of a disfavored minority. *See* Robert Dahl, *A Preface to Democratic Theory* 11-17 (1956).

Hence, a central preoccupation of the constitutional debates was how to prevent these temporary majorities from restricting or foreclosing the political prospects of minorities. *See The Federalist No. 10* (James Madison). The solution has been described as "a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side and the desire to limit their sovereignty on the other." Dahl, *supra*, at 4.

One of the most important means used by the framers to mediate between majority and minority interests was to structure a political process that would be duly responsive to each. As Dean Ely describes that compromise, the Constitution leaves

> the selection and accommodation of substantive values . . . almost entirely to the political process . . . . [T]he document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with . . . process writ large — with

[5] 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 203 (Elliott ed., 1941).

[6] *See* U.S. Const. art. V.

> ensuring broad participation in the processes and distributions of government.

Ely, *supra*, at 87 (citations omitted).

The framers also believed that they could keep majorities from abusing minorities by assuring that the tools of power were both indirect and decentralized. A decentralized, representative system would protect minorities because majorities would be coalitions of various smaller groups that would be apt to change often as different issues took on relatively greater importance. The need to build coalitions also would lead to compromise as groups would agree to make concessions on one issue in order to gain support for another.

However clear the framers' goals may have been, implementing them was another matter. *Id.* at 80-81. By the mid-nineteenth century, it had become increasingly evident that these mechanisms were not sufficient to protect minority interests since majorities tended to endure and representatives often failed to represent minority interests. Therefore, some greater measure of protection was necessary to ensure that government would not simply ignore minority rights.

The Equal Protection Clause of the Fourteenth Amendment reflects the most important attempt to resolve this continuing dilemma. At its most basic level, the Clause commands the states to represent the interests of minorities (as well as majorities) by extending to *all* persons the equal protection of the laws. As Justice Jackson put it in his famous concurrence in *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949), "there is no more effective guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *See also Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) ("the Equal Protection Clause . . . requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.") (Scalia, J., concurring). These formulations suggest — as does the very language of the Clause, "equal protection of the laws," not "protection of *equal*

laws" — a concern with process and structure at least as much as with substance or outcomes.

This case, also, is about process rather than outcomes. The central vice of Amendment 2 is that it creates a *permanent structural alteration* of the process of government in Colorado to the specific disadvantage of gay men, lesbians and bisexuals. Only they must clear a unique hurdle — a constitutional amendment — to secure protection against discrimination.

That is a "malfunction" of government which undermines the "basic assumption" upon which deference to the political process rests. In Dean Ely's words, the political process is "undeserving of trust" when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Ely, *supra*, at 103. In such a circumstance, a "more searching" judicial review is not merely appropriate, it is necessary. In fact, such review is not only a function well-suited "to the capabilities of the courts," but is also one "which will not likely be performed elsewhere if the courts do not assume it." Alexander Bickel, *The Least Dangerous Branch* 24 (1962).

II. THIS COURT HAS RECOGNIZED A RIGHT OF EQUAL POLITICAL PARTICIPATION WHICH INCLUDES, BUT IS NOT LIMITED TO, THE RIGHT TO VOTE.

The right to vote has been identified as a critical aspect of the right to effective political participation. This Court has considered

various aspects of that right, including vote dilution,[7] ballot access restrictions,[8] gerrymandering,[9] and voter qualifications.[10] However, the Court also has expressed unmistakable concern with efforts to corrupt the political process by creating a two-tier legislative structure in which certain individuals must traverse a more burdensome path to advance or protect their interests. *See, e.g., Hunter*, 393 U.S. at 389-91; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474-75 (1982).

A. The Right to Vote Is Part of a Broader Right.

Petitioners contend that the Colorado Supreme Court erred in concluding that there is a right of political participation that extends beyond the "right to vote," as such. Pet. Br. at 25-28. But that excessively narrow reading simply is not sustainable. It ignores not only the language and holdings of specific cases, but also the *articulated* premises on which they rest.

If the right to vote were the only aspect of political participation protected by the Equal Protection Clause, it would have been sufficient to stop with cases like *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), *Carrington v. Rash*, 380 U.S. 89 (1965), and *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), in which certain individuals literally were "fenced out" of the political process by being denied the franchise. The Court, however, has made it clear that equal protection in the political process demands more than mere access to a voting booth. Indeed, as the Colorado Supreme Court observed, in cases

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[7] *See, e.g., White v. Regester*, 412 U.S. 755 (1973); *Avery v. Midland County*, 390 U.S. 474 (1968); *Lucas v. Forty-Fourth Colo. Gen. Assembly*, 377 U.S. 713 (1964).

[8] *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Williams v. Rhodes*, 393 U.S. 23 (1968).

[9] *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[10] *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

such as *Reynolds v. Sims* no one was denied the vote. *Evans v. Romer*, 854 P.2d 1270, 1277-78 (Colo. 1993). Rather, the equal protection issue was presented by the inability of certain citizens to have an *equal and effective* opportunity to influence the outcome of the legislative process because of the way electoral districts were drawn. *Reynolds*, 377 U.S. at 561-68.

In fact, *Reynolds* directly refutes petitioners' claim that "voting" is the end-point right, rather than being supportive of a broader right to effective participation through equal process. The Court scarcely could have been more explicit:

> [E]ach and every citizen has an inalienable right to *full and effective* participation in the *political processes of his State's legislative bodies.* Most citizens can achieve *this participation* only as qualified voters .... Full and effective participation by all citizens in state government requires, *therefore,* that each citizen have an equally effective voice in the election of members of his state legislature.

377 U.S. at 565 (emphasis added); *see also Board of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (aim of equal protection is to provide fair and effective representation for all citizens); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (all qualified voters have the right "to cast their votes effectively"); *Whitcomb v. Chavis*, 403 U.S. 124, 141-42 (1971).[11]

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[11] None of these principles, including the right to vote, is explicitly enumerated in the Constitution. Rather, such rights have been "*inferred* from the nature of 'a free and democratic society' and from its importance as a 'preservative of other basic civil and political rights....'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 n.4 (1980) (Brennan, J., concurring) (quoting *Reynolds*, 377 U.S. at 561-62) (emphasis added). Thus, far from political participation rights being derivative of, or subsidiary to, other enumerated rights, the latter are protected, at least in part, because they are "essential to effective exercise of the power of correcting error through the *processes* of popular government." *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) (emphasis added) (citing *Carolene Products*); *see also Richmond Newspapers*, 448 U.S. at 587 ("the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government") (Brennan, J., concurring) (citing *Carolene Products* and Ely, *Democracy and Distrust*) (emphasis added).

Not only are petitioners mistaken about the existence (and dimension) of a political participation right, they overlook the fact that this right is rooted in the very majoritarian principles upon which they rely. In fact, assuring effective participation by all citizens in the process of government makes true majority rule possible and reinforces its legitimacy.[12]

In short, voting is not merely an end in itself, but is one of the means by which the broader right to fair process is effectuated. There is no principled reason why "all people, one process" is not as much a part of equal protection as "one person, one vote."

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[12] With apparently unconscious irony, petitioners explain that "fundamental rights" are those that are "deeply rooted in this Nation's history and tradition" (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)), or which reflect "basic choices made by the people themselves in constituting their system of government...." (quoting *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 791 (1986) (White, J., dissenting). Pet. Br. at 29. Petitioners expand upon this point by quoting from a recent law review article that warns against the "danger of expanding rights" by "remov[ing] power from the democratic process," thus "limit[ing] the capacity of self-government." Pet. Br. at 29 n.19 (citing David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1100 (1991)).

It does not seem too much of a stretch to suggest that fair and equal access to the processes of government is an idea rooted in this country's "traditions" and its "system of government." *See supra* pp. 7-10. Nor is there a need to apologize for claiming that the "democratic process" of "self-government" is furthered, not undermined, by assuring that the processes through which it operates — as opposed to the outcomes it reaches — must be nondiscriminatory.

B. Principles Recognized by This Court in *Hunter, Seattle School District* and *Gordon* Support the Existence of a Right to Equal Participation in the Political Process.

Amendment 2 violates the Equal Protection Clause because it purposefully restricts effective access by gays, lesbians and bisexuals to the regular channels through which anti-discrimination and other political interests normally are pursued in our republican system of government. It does that in much the same way that malapportioned state legislatures once created a "legislative strait jacket"[13] for residents of more populous districts: by jiggering the process and thereby, in Judge Leventhal's words, "keeping the 'ins' in and the 'outs' out." Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 380 (1977).

Petitioners seemingly do not take issue with this characterization. In fact, their brief all but concedes that if Asians or Catholics were substituted for homosexuals, lesbians and bisexuals in Amendment 2 it would be unconstitutional, without more, under cases such as *Hunter* and *Seattle School District*. The difference, say petitioners, is that the Fourteenth Amendment has a special solicitude for, *e.g.*, Asians and Catholics that it does not extend to other socially-identified groups, such as gays and lesbians, the elderly or the disabled.

We believe that this argument should be rejected *as applied to the right to participate equally in the political process*. The proposition that government may not place extra obstacles in the path of any particular group of citizens in seeking to advance their political interests is hardly a radical notion. To the contrary, it appeals to the very idea of equality of political opportunity that democratic government and equal protection of the laws embody — even more directly than Justice Stone's alternative paradigm of "discrete and insular" minorities. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 748, 783 (1991) (a political process theory that relies solely on the "access" prong of *Carolene Products* "can

[13] *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

avoid controversial value choices in identifying appropriate occasions for judicial review").

Contrary to petitioners' assertions, the decision below does not represent a radical departure from established constitutional principles. Rather, it is the legitimate heir to Justice Harlan's concurrence in *Hunter v. Erickson*, in which he identified the absence of a "neutral principle" for affording access to the political process as the critical vice which rendered Akron's city charter amendment constitutionally infirm under the Equal Protection Clause.

Both *Hunter* and *Seattle School District* confirm rights of equality of political access in terms broader than suspect class analysis. *Evans*, 854 P.2d at 1279-81. Thus, for example, *Hunter* focused substantial attention on Akron's selective deviation from neutral principles in its city charter amendment, which "plac[ed] special burdens on racial minorities within the governmental process." 393 U.S. at 391.[14]

The same observations can be made about Amendment 2. It places "special burdens" upon a particular group of individuals ("minorit[y]") in the "governmental process." Thus, the sole question is whether the *racial* character of the group singled out in *Hunter* was critical to the result. While some parts of the opinion undeniably focus on that aspect of the case, the opinion also articulates a broader principle which, if applied here without the slightest alteration, would be dispositive of this case. As Justice White stated for the Court, while Akron unquestionably was free to require plebiscites generally it could

> no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Hunter, 393 U.S. at 393 (citations omitted).

[14] The Court also drew a specific parallel between that burden and the unequal voting regimes at issue in *Reynolds*, 377 U.S. 533, and *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). *See Hunter*, 393 U.S. at 391.

That observation is particularly significant in light of Justice Harlan's concurrence. His opinion carefully delineated the broad latitude enjoyed by state and local governments to take actions that have the effect of burdening particular groups (even specially protected "suspect" ones), but only so long as the general "framework" for political decision-making is "just" and is grounded in "neutral principles." *Id.* at 393-95. The Akron charter amendment failed that test because, like Amendment 2, its aim and effect were simply to disadvantage certain citizens seeking to protect their basic political interests against discrimination.

Nearly fifteen years later, in the *Seattle School District* case, the Court identified Justice Harlan's "neutral principles" formulation as the "simple but central principle" underlying *Hunter*. 458 U.S. at 469-70. The initiative at issue in that case also was directed at racial minorities and the Court discussed that fact at length. However, as it did in *Hunter*, the Court described the vice of the law in more general terms. Specifically, the opinion noted that laws which "make it more difficult for *every* group in the community to enact comparable laws . . . 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.' " *Id.* at 470. Washington's initiative, however, did " 'not attempt[ ] to allocate governmental power on the basis of any general principle' " but, rather, simply burdened the rights of specific citizens. *Id.* (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).[15]

Two additional cases, decided within six weeks of each other, further illuminate these issues. In *James v. Valtierra*, 402 U.S.

[15] *Crawford v. Board of Education*, 458 U.S. 527 (1982), decided the same day as *Seattle School District*, highlights the point. Contrary to petitioners' incomplete reading of *Crawford*, the legislation at issue in that case transparently did not " 'fence[ ] out' an 'identifiable group' . . . from the ordinary political process." Pet. Br. at 33. Quite the opposite: the Court upheld the initiative in that case *because* it did not alter the political process. Thus, the Court distinguished *Hunter* on the ground that the initiative in *Crawford* was a "simple repeal" of legislation, whereas the Akron ordinance "involved more." 458 U.S. at 538-41.

137 (1971), the Court upheld a California referendum that required local voters to approve new low-income public housing projects. In so doing, the Court declined to extend the category of suspect classes to encompass low-income people pursuing their political interest in taxpayer-financed housing. Shortly thereafter, in *Gordon v. Lance*, 403 U.S. 1 (1971), the Court upheld constitutional and statutory provisions requiring super-majority approval of increases in bonded indebtedness after concluding that — unlike *Hunter* — the West Virginia provisions "applied equally to all bond issues for any purpose" and did not burden the rights of any "independently identifiable group." *Id.* at 5. The majority in the Colorado Supreme Court interpreted *Gordon* as having adopted a neutral principles view of *Hunter*. *Evans*, 854 P.2d at 1281-82. By contrast, both the dissent and petitioners claim that *James* is controlling, dismissing *Gordon* as irrelevant. *See* Pet. Br. at 21-22, 23 n.13; *Evans*, 854 P.2d at 1298-99 (Erickson, J., dissenting).

But *Gordon* is highly relevant, for it shows unmistakably that the Court which had decided *James* only a few weeks earlier did not, itself, regard *Hunter* as limited to suspect classes. Plainly, *James* did approach *Hunter* as a "suspect class" case and declined appellee's invitation to apply heightened scrutiny to a "class" of low-income residents. *Gordon*, however, involved no race, or other suspect class, issue. In fact, it was decided by the West Virginia Supreme Court solely as a voting case controlled by decisions such as *Reynolds*, *Kramer*, and *Wesberry v. Sanders*, 376 U.S. 1 (1964). *See Lance v. Board of Education*, 170 S.E.2d 783, 786-90 (W. Va. 1969). *Hunter* was not even mentioned.

This Court found the voting cases unpersuasive. *See Gordon*, 403 U.S. at 4-5. Instead, the Court analyzed the issues under *Hunter*. That would have been peculiar if petitioners' characterization of *James* were correct since, under their interpretation, *Hunter* would have been utterly irrelevant.[16] Thus, the Court's

[16] At most, the Court could have distinguished that decision in a brief footnote which observed that, "unlike *Hunter*, this case concededly does not involve a racial, or other suspect, classification. *See James*." Having decided *James* only a few weeks before, it is inconceivable that the

focus on *Hunter*, at a minimum, acknowledges that *Hunter* and *Gordon* are part of the same "family" of cases. And, since *Gordon* plainly had nothing to do with race, the perceived relationship must turn on the right of political participation.

The Court distinguished *Hunter* on the ground that the West Virginia laws, unlike Akron's city charter amendment, "applie[d] equally to all bond issues for any purpose" and did not "single[] out" any particular group for unique disadvantages in the political process. *Id.* at 5. Thus, the Court observed that it could "discern no *independently identifiable group* or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* (emphasis added). Under those circumstances, the Court held that equal protection was not violated.

While *Gordon* referred to the fact that the ordinance at issue in *Hunter* involved a racial classification, nothing in its analysis turned on that observation. Rather, the Court's suggestion that the West Virginia provisions would have been held unconstitutional if there had been some "independently identifiable group" that "favor[ed] bonded indebtedness" strongly implies that the critical issue for constitutional purposes was the existence *vel non* of discrimination against a particular group, not whether the group discriminated against was entitled to special consideration under the Equal Protection Clause. *See id.* That implication was made manifest two pages later in the Court's statement of the controlling constitutional principle: "We conclude that *so long as* [laws] do not discriminate against or authorize discrimination against *any identifiable class* they do not violate the Equal Protection Clause." *Id.* at 7 (emphasis added).[17]

Gordon Court was unaware of what it had said about *Hunter* in its earlier decision.

[17] As this Court put it more recently in *Burdick v. Takushi*, restrictions on voting are upheld "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters . . . ." 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Amici do not claim that *Gordon* is directly controlling here. What we contend is that this Court has recognized the importance of maintaining equal access to the process of government and that this case falls squarely within the category of constitutional wrongs — identified by the Court in *Hunter* and confirmed by it in *Gordon* and *Seattle School District* — in which the fatal vice is the absence of a "neutral principle" for configuring access to the political process.

III. AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY DEPRIVING AN INDEPENDENTLY IDENTIFIABLE GROUP OF CITIZENS OF EQUAL PARTICIPATION IN THE PROCESSES OF GOVERNMENT.

In addition to denying the existence of a right of political participation, petitioners contend that states are free to allocate governmental authority and jurisdiction as they see fit with respect to any "issue." Pet. Br. at 11, 26, 27. Thus, for example, petitioners suggest that the Constitution does not prevent a state from making such issues as education or employment rights matters of statewide, as opposed to local, jurisdiction. Pet. Br. at 28, 31. Similarly, in their view, a law banning smoking or hunting is not subject to constitutional challenge merely because it disadvantages individuals who wish to smoke or hunt.

Amici do not quarrel with those propositions. However, Amendment 2 is not about *issues* and it is not about *outcomes*. It is about the political rights of *people*, to wit, gay men, lesbians and bisexuals, and about erecting obstacles which selectively disable them from effectively protecting their legal interests through the generally-available processes of government. That is a far different, and narrower, right than petitioners' unhelpful caricature of the decision below suggests.[18]

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[18] Petitioners argue that this Court should reverse the decision below because "even improvident decisions will be rectified by the democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Pet. Br. at 18-19 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). But that

Specifically, *amici* submit that Amendment 2 is constitutionally infirm because it singles out one group from among the many that might seek protection against discrimination in, *e.g.*, housing, employment or public accommodation and alters, for that group alone, the process for obtaining such protection. While states surely are free to allocate legal authority and jurisdiction as they see fit with respect to issues such as fair housing (or, for that matter, farming, smoking or trout fishing), it is another matter to selectively disable a particular group of citizens from seeking to protect their rights in the same forums and manner in which such issues are addressable by everyone else.[19]

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assertion simply begs the question. As discussed above, *amici* agree that the judiciary ordinarily should defer to the political judgments of the people acting directly or through their elected representatives. However, when the conditions for judicial intervention *are* met — as in this case — it is no defense to observe that the political process retains the potential to undo its own mistakes.

[19] Although understandably not denominated as such, the arguments of petitioners and *amicus* Equal Rights, Not Special Rights, Inc. ("ER/NSR") are tantamount to a plea for a new principle of non-justiciability. *Cf. Baker v. Carr*, 369 U.S. 186 (1963). As they would have it, once the people have spoken, the judiciary has no role to play in "second guessing" popular judgments so long as no suspect class is involved.

In that regard, it is important to consider Justice O'Connor's separate opinion in *Davis v. Bandemer*, 478 U.S. 109, 144 (1986). In that case, a majority of this Court held that claims of "political gerrymandering" presented justiciable claims, although the Court ultimately found that no constitutional violation had occurred. *Id.* at 143. Justice O'Connor dissented from the justiciability holding on the ground that a demand for "an equal share of political power" is not the type of issue that is properly addressed by the judiciary. *Id.* at 147.

The issue in this case is entirely different. Whether a right to some proportionate "share of political power" might appropriately be recognized in some circumstances presents a question entirely different from the issue here, where the right at stake is simply the right of individuals not to have the deck specifically stacked against them in seeking to protect their interests through the political process.

A. Individuals, Not Issues

The "political process" cases — from *Harper* to *Reynolds* to *Hunter* to *Gordon* — speak in terms of individuals, not issues. For purposes of their analysis it makes no difference whether the challenged inhibition rests on military status,[20] property ownership[21] or race.[22] It is the fact that the political and legal access of particular people has been discriminatorily restricted that is critical.

Petitioners and their *amici* attempt to depict this case as if the issue were the allocation of governmental authority among state and local officials and courts, or the power of the people to legislate directly through initiatives or referenda. Pet. Br. at 27-28, 31; *see also* ER/NSR Br. at 8-11. But that argument is simply miscast. We assume that the people of Colorado could, if they chose, make non-discrimination in housing a subject of statewide concern, repealing all contrary local ordinances in the process. What they clearly may not do, however, is allow local jurisdictions (or the state legislature and executive) to create, and courts to apply, laws protecting the housing rights of parents, truck drivers, veterans and the disabled, while foreclosing the ability of gay men, lesbians and bisexuals to seek comparable protections in the same forums. *See Seattle School District*, 458 U.S. at 478-79. Petitioners' repeated use of the term "group right" (although intended pejoratively) suggests that they understand this important distinction. *See* Pet. Br. at, *e.g.*, 10, 25, 28.[23]

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[20] *Carrington v. Rash*, 380 U.S. 89 (1965).

[21] *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

[22] *Hunter v. Erickson*, 393 U.S. 385 (1969).

[23] It is no defense to argue that Amendment 2 (any more than the charter amendment in *Hunter*) is directed at the *issue* of gay rights and that it creates no discrimination because it prevents *everyone* — whatever their sexual orientation — from seeking anti-discrimination legislation for gays and lesbians. In addition to evoking Anatole France's well-known observation about the law preventing rich and poor alike from sleeping under bridges, the argument misses the point in two important respects. *First*, what Amendment 2 affects is the ability of

Petitioners and ER/NSR also assert that the appropriate question to be considered is simply whether those who oppose a piece of legislation and those who favor it are treated equally. Pet. Br. at 27. However, that argument misses the heart of what is unconstitutional about Amendment 2. The pertinent issue is not whether groups seeking competing outcomes or holding opposing opinions must travel along identical routes in the political process, but whether all groups seeking the *same* kind of legislative protections must travel along identical routes. Contrary to petitioners' argument, it is only when a state treats some people differently from others in the process of seeking identical kinds of legislative benefits that the state targets *people*, rather than issues or outcomes, and thereby violates the Fourteenth Amendment. If disabled people or truck drivers or heterosexuals in Colorado want to be protected by non-discrimination laws, they may go to some court (if applicable anti-discrimination laws already exist) or to some state or local legislative body (if they do not) and seek that protection. Gay men, lesbians and bisexuals — and they alone — may not. That distinction violates their right to equal protection of the laws in the most direct sense.[24]

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certain specified *individuals* (*i.e.*, gays, lesbians and bisexuals) to obtain protection against discrimination. An *issue*, by contrast, is the type of protection those individuals might hope to obtain (*e.g.*, fair housing or other equal benefits). The problem with Amendment 2 is that to obtain any type of protection, gays and lesbians, alone, must follow a special (and especially difficult) process.

Second, while we are concerned here with *process*, it is process directed at an outcome. Thus, to say that everyone is equally disabled from seeking anti-discrimination legislation for gays is like saying, prior to *Reynolds* and *Lucas*, that everyone could decide to vote against special treatment for rural residents. The idea of *effective* participation implies equal process so that people may seek particular outcomes from that process.

[24] Petitioners claim that Amendment 2 imposes no special burden on gays, lesbians and bisexuals because they are free to work for the repeal of Amendment 2 through the very same process that was used to enact it. It hardly needs to be pointed out that since no law is immune from constitutional scrutiny simply by virtue of the fact that it can be repealed, the fact that Amendment 2 was created by a referendum and could be repealed by that same process does not save it from constitutional invalidity. Moreover, to argue that requiring one group — and only that group — to enact a constitutional amendment to protect itself from discrimination works no handicap on that group is to ignore the reality of the political process. *See Seattle School District*, 458 U.S. at 474-75 n.17 (rejecting the argument that compelling a group to surmount a unique obstacle in the political process resulted in no cognizable harm).

B. "Independently" Identifiable

Gordon refers to "independently identifiable group[s]" as the proper touchstone for determining whether a law affecting process denies equal protection. That is a useful formulation since it captures both the nature and the limits of the right in question.

Gordon's reference to a group that is "independently" identifiable is striking and cannot have been accidental. A group is independently identifiable where it can be described without reference to any particular issue. Thus, for example, in *Gordon*, people who favored bonded indebtedness demonstrably were disadvantaged by West Virginia's super-majority voting requirement. Yet, as the Court explained, that fact did not make them a protectable class for equal protection purposes since (a) the same voting requirements applied to all forms of bonded indebtedness for any "purpose" ("whether for schools, sewers or highways") and (b) the affected group was not identifiable *except* by reference to its position on that issue. 403 U.S. at 5.

By contrast, gay men and lesbians — like Hispanics, Army officers, skiers and smokers — are identifiable apart from particular issues that affect their rights. Thus, for example, it is perfectly comprehensible to speak of "Hispanics" or "veterans," as such, without relating that identity to any underlying issue, such as housing, jobs or bonded indebtedness.

Some groups, of course, are defined in whole or in part by a specific activity. Thus, unlike blacks or redheads, "farmers" are a class defined by an occupation, "poker players" by a certain recreational activity and "vegetarians" by their diet. Many laws make it harder for such groups to protect their interests in the activity which defines the class — a law repealing municipal

option legislation for poker clubs, for example. If such laws go no further than to regulate the "definitional" activity there is no basis for special equal protection concern. Put otherwise, a class defined by an activity is not — *as to regulation of that activity* — independently identifiable.

This distinction is important. As noted previously, were Colorado to adopt a constitutional amendment prohibiting cities from regulating smoking, the mere fact that *non-smokers* thereby would be disadvantaged in seeking to protect their desire for a smoke-free environment does not, in our view, raise special concerns under the Equal Protection Clause. However, if the people of Colorado, in a fit of anti-smoker hysteria, went further and precluded smokers from seeking legislation to protect themselves from arbitrary or malicious discrimination in housing, education or employment, such concern would be appropriate since the affected class ("smokers") is unrelated to (*i.e.*, is independent of) the subject matter of the prohibition (*i.e.*, housing, jobs or education).

That is, of course, the vice of Amendment 2. Unlike all of the other groups (*e.g.*, blacks, or veterans, or hunters or the elderly) who may seek anti-discrimination legislation from ordinary local or statewide lawmaking bodies in Colorado, gay men and lesbians may not. Moreover, even assuming *arguendo* that the group identified by Amendment 2 is a class defined by a particular activity — as opposed to being merely descriptive of a personal trait, such as being Hispanic or left-handed or deaf — the referendum is not limited to the activity that defines the class but, instead, flatly disables gays and lesbians from seeking *any form* of anti-discrimination protection from any branch or agency of Colorado's state or local government.

C. Process, Not Outcome

Petitioners say that this case is about slippery slopes. *See* Pet. Br. at, *e.g.*, 12, 36-37. *Amici* submit that it is about level playing fields. Far from involving any extraordinary redefinition of our federal system or limiting the rights of majorities to prevail, the

result below and the principle on which it rests are quite narrow.[25] Only process, not outcome, is at issue.

It is, instead, Amendment 2 that is "extraordinary." Pet. Br. at 9. The Amendment creates a system in which gays, lesbians and bisexuals are singled out and subjected to a special and more onerous process in seeking to protect their political interests. Moreover, the preclusion is permanent. Put simply, Amendment 2 is a process-based obstacle course that only gays, lesbians and bisexuals are required to negotiate.[26]

There may, of course, be close cases. Constitutional issues are rarely clear-cut and lawyers tend to be both creative and tenacious. But tomorrow's difficult case is no justification for failing to deal correctly with today's easy one. *See Keller v. State Bar*, 496 U.S. 1, 15-16 (1990). Amendment 2 is, to borrow Justice

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[25] Once again, petitioners' assertions are misdirected. Because groups are not *independently* identifiable by virtue of their position on an issue and because they do not *become* independently identifiable where a referendum regulates only the activity that defines the group, it simply is not the case that *any* legislation affecting *any* group could be overturned under the principles enunciated in this case.

ER/NSR attempts to demonstrate the supposed perversity of the Colorado Supreme Court's decision by suggesting that it would have the ironic result of disabling the very people who have a particular interest in a matter from objecting to a law regarding it. ER/NSR Br. at 18-19. But such a result is not perverse at all. Rather, it is required by the very principles that petitioners and ER/NSR so vigorously espouse: namely, that majority rights are not to be put aside simply because some group has lost the vote on a particular substantive issue. Smokers have no claim to overturn a law that keeps them from smoking in restaurants. It is only if the law goes beyond that particular activity and deprives them of the same right to seek non-discrimination protection as other groups have that a constitutional issue is presented under the Equal Protection Clause.

[26] Petitioners repeatedly refer to "special" or "preferential" protections for gay men and lesbians as if this were an "affirmative action" case. *See* Pet. Br. at 9, 11, 14, 30. The argument is as misguided as its motivation is transparent. Hoping to avoid discrimination and to be treated equally is scarcely a demand for "special" consideration.

Frankfurter's phrase, an "uncouth"[27] law. Manipulating the political process now and for the future by taking certain people's rights off the table is not merely poor practice — it denies those people the ability to obtain "equal protection of the laws."

Well-settled principles recognize that equal protection is violated when certain people are "fenced out" of the political process. *Carrington*, 380 U.S. at 94. The same is true when their political effectiveness is "diluted." *Reynolds*, 377 U.S. at 555. The result should not be different merely because the "fencing out" and "dilution" take place at a different point in the process. Amendment 2 is the ultimate exercise in group gerrymandering. As such, it goes too far and is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

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[27] *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

APPENDIX A

BAR ASSOCIATIONS. Each association named below is the chief membership organization for the legal profession in its state or county, or a section of such an organization, or the chief membership organization representing women attorneys in the state. Some of the *amici* associations, including Arizona and Oregon, are integrated bar associations which mandate membership by all practicing attorneys in the state. Other bar associations listed are voluntary bar associations. The State Bar of Wisconsin, an integrated bar association, has authorized participation of its Individual Rights Section.

All *amici* associations of the bar have a specific interest in insuring their continued ability to adopt and enforce or support the adoption and enforcement of ethical canons and codes of professional conduct prohibiting discrimination of all sorts in the judicial process, in the provision of legal services and in the interaction of attorneys with each other and with clients. The *amici* integrated bar associations, which would be directly affected by a provision like Amendment 2 in their respective states, also have an interest in providing equal protection of the laws to their members and those served by the legal profession. Measures, such as Amendment 2, which ban government from ever prohibiting discrimination against a targeted class of persons, would disable *amici* associations from eradicating invidious discrimination based on sexual orientation and other characteristics in the legal profession, no matter how great the need. By participating in this case, *amici* seek to ensure their ability to perform fully their duty to the legal profession and its clients.

State Bar of Arizona
Colorado Bar Association
Connecticut Bar Association
Delaware State Bar Association
Florida Association for Women Lawyers
Illinois State Bar Association
Kansas Bar Association
Maine State Bar Association
Massachusetts Bar Association
Minnesota State Bar Association

Minnesota Women Lawyers
State Bar of Montana, Women's Law Section
New Jersey State Bar Association
New Mexico Women's Bar Association
New York County Lawyers' Association
Oregon State Bar
Vermont Bar Association
State Bar of Wisconsin, Individual Rights Section

THE SOCIETY OF AMERICAN LAW TEACHERS ("SALT") is an association of more than 800 individual law faculty members, which was incorporated in 1974 by a group of law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT's particular concerns have been: (1) the availability of legal services to all persons, regardless of ability to pay, and (2) the enrichment of the legal academy by the inclusion of historically underrepresented groups within the student body and the faculty. Lesbians, bisexuals and gay men constitute one of the underrepresented groups that SALT has supported over the years. The SALT Board of Governors has worked with other legal education groups to monitor the status of lesbians, bisexuals and gay men in legal education. Because of concerns about discrimination, SALT encouraged the Association of American Law Schools (AALS) to amend its Bylaw 6-4 prohibiting discrimination on the basis of race, color, religion, national origin or sex, so as to include sexual orientation (as well as age, handicap or disability). At least two AALS law schools in Colorado are affected by Amendment 2. The University of Colorado and the University of Denver, as political subdivisions of the state, would be prevented under Amendment 2 from prohibiting discrimination against their lesbian, bisexual and gay students, staff and faculty. SALT believes that it is essential to quality legal education that all persons in an educational institution, including lesbian, gay and bisexual persons, be assured that they will not be the victims of prejudicial, hateful or hostile actions.

COMMON CAUSE is a nonprofit membership corporation that promotes, on a non-partisan basis, its members' interest in open, honest and effective government and political representation.

Common Cause seeks to achieve this objective by making government more responsive to the needs and demands of citizens through government and election reform, as well as through advocacy of civil rights laws which assure the fair and equal treatment of all citizens.

PEOPLE FOR THE AMERICAN WAY is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members across the country, including in Colorado. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation and conducts programs and studies directed at reducing problems of bias, injustice and discrimination. This case is of particular importance to People For because the decision of the Colorado Supreme Court properly rejected the unacceptable concept that gay men and lesbians are second-class citizens who may be excluded from this country's political processes and denied its legal protections. It is vitally important that this Court affirm that decision and the fundamental principle that all persons, including gay men and lesbians, are entitled to the equal protection of the law.

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IN THE

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OCTOBER TERM, 1994

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,

Petitioners,

—v.—

RICHARD G. EVANS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does "Amendment 2," a popularly enacted state constitutional amendment that bars state and local government from enacting any laws or policies that prohibit, or otherwise attempt to end, discrimination against gay men, lesbians, and bisexuals, violate the Equal Protection Clause?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
AMENDMENT 2 DOES NOT RATIONALLY ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST AND VIOLATES RESPONDENTS' RIGHT TO EQUAL PROTECTION OF THE LAWS	4
I. The Proper Application Of The Rational Basis Standard In This Case	5
A. The Presence Of Illegitimate State Purposes Requires That Other Proffered State Interests Be Examined With Particular Care	5
B. Economic, Tax, And Social Welfare Benefit Classifications Are Given The Utmost Deference; Classifications Dealing With Civil Rights Receive A Closer Examination	8

	PAGE
II. Four State Purposes Behind Amendment 2 Are Illegitimate	10
A. Purposes Antithetical To The American Political System	11
1. Deterring Factional Debate On A Particular Political Issue Is Not A Valid State Objective	11
2. The State, Without More, Has No Legitimate Interest In Barring Government Response To The Political Objectives Of A "Special Interest Group"	14
B. Purposes That Sanctify Private Prejudice	15
1. The State Has A Strong Interest In Protecting The Well-Being Of Children; Such Interest, However, Is Not Legitimate Where Grounded In Myths And Unfounded Fears	15
2. Serving "Prevailing Preferences" To Avoid Associations With Gay Men, Lesbians, And Bisexuals Is Not A Permissible Government Objective	18
III. The Additional Proffered Justifications Fail Rationally To Explain Amendment 2's Classification	19

PAGE

A. Concerns About Minimal Government Or Efficient Legal Rules Do Not Justify Amendment 2's Line-Drawing 20

B. The Goal Of Reserving Discrimination Remedies For "Suspect And Other Needy Classes" Does Not Rationally Explain This Scheme 21

C. First Amendment Freedoms Do Not Provide A Rational Basis For This Classification 22

D. Amendment 2 In No Way Relates To Parents' Ability To Teach Their Children Moral Values 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases PAGE

Bowen v. Owens, 476 U.S. 340 (1986) 9

Califano v. Jobst, 434 U.S. 47 (1977) 9

Carey v. Brown, 447 U.S. 455 (1980) 12

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) ..... *passim*

Dandridge v. Williams, 397 U.S. 471 (1970) 9

FCC v. Beach Communications, Inc., 508 U.S. ___, 113 S. Ct. 2096 (1993) 8, 9, 20

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 14

Heller v. Doe, 509 U.S. ___, 113 S. Ct. 2637 (1993) 3, 5, 6, 19

Hishon v. King & Spalding, 467 U.S. 69 (1984) 22, 23

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 8

Hunter v. Underwood, 471 U.S. 222 (1985) 10

Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) 19

James v. Strange, 407 U.S. 128 (1972) 21

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 9

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10

Loving v. Virginia, 388 U.S. 1 (1967) 19

PAGE

Lyng v. Castillo, 477 U.S. 635 (1986) 8, 9

Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) 19

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985) 7, 20

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 9

New York State Club Association, Inc. v. City of New York, 487 U.S. 1 (1988) 15

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 13

Nordlinger v. Hahn, 505 U.S. ___, 112 S. Ct. 2332 (1992) 9

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 12

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 22

Reitman v. Mulkey, 387 U.S. 369 (1967) 10

Rinaldi v. Yeager, 384 U.S. 305 (1966) 21

Runyon v. McCrary, 427 U.S. 160 (1976) 23

Texas v. Johnson, 491 U.S. 397 (1989) 12

United States v. Carolene Products Co., 304 U.S. 144 (1938) 8

United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) 6, 7, 8, 10, 14, 19

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 9

PAGE

Vance v. Bradley, 440 U.S. 93 (1979) 7

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 13

Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981) 5

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 9

Zobel v. Williams, 457 U.S. 55 (1982) 6, 10

Statutes

Aspen Mun. Code § 13-98 21

Denver Rev. Mun. Code, ch. 28, art. IV, § 28-91(b) ... 21

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Bar Association ("ABA") respectfully submits this brief *amicus curiae* in support of Respondents, pursuant to Rule 37 of the Rules of the Supreme Court. Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

INTEREST OF *AMICUS*

The American Bar Association, with approximately 340,000 members across the United States, is the leading national membership organization of the legal profession. Its

members include attorneys in private practice, attorneys for nonprofit organizations and for corporations, prosecutors, public defenders, federal and state trial and appellate judges, legislators, law professors and students, and nonlawyer associates in related fields.

The Association has adopted numerous policies that seek to rid the legal profession, the judicial process, and the laws of this country of bias, including bias against gay men, lesbians, and bisexuals. Among these is a policy adopted by the ABA House of Delegates in February 1989 "urg[ing] the Federal government, the states and the local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations."

The challenged state constitutional amendment ("Amendment 2"), if allowed to stand, would bar the enactment of such legislation and nullify existing laws and regulations that prohibit discrimination against gay men, lesbians, and bisexuals in housing, workplaces, and other public settings and government agencies in Colorado.

The ABA therefore has a strong interest in the matter before the Court.[1]

SUMMARY OF ARGUMENT

The Colorado Supreme Court struck down Amendment 2 on the ground that it infringes upon the fundamental right to equal participation in the political process and is not narrowly

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

tailored to achieve a compelling state interest. We support that conclusion and the court's analysis. However, we argue here that Amendment 2 cannot survive judicial scrutiny even under the rational basis test.

Where there is no reason to suspect that a classification is based upon illegitimate state purposes, or where the classification concerns such matters as economic, tax, or cash benefit programs, the rational basis standard is applied in an exceedingly deferential fashion. However, where the reviewing court finds evidence that irrational prejudice or other illegitimate state purposes played a role in the challenged classification, the court applies the standard with greater rigor. Thus, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-450 (1985), the Court not only set aside the illegitimate state interests that appeared on the record, but also conducted a thorough and searching review of the other interests proffered by the City to ensure that the illegitimate purposes were not, in fact, the sole basis for the classification.

In this case, at least four of the purposes that have been advanced by Petitioners are illegitimate state interests aimed at silencing political debate and enshrining private prejudices in the state constitution. Such a record triggers the careful rational basis review that *Cleburne* prescribes. As in that case, once the illegitimate purposes have been set aside, none of Petitioners' other claimed state interests can explain the singling out of the targeted group. "The short of it is" that Amendment 2's classification "rest[s] on . . . irrational prejudice," *Cleburne*, 473 U.S. at 450, and even the apparently legitimate purposes asserted by Petitioners can find no "footing in the realities of the subject addressed," *Heller v. Doe*, 509 U.S. ___, 113 S. Ct. 2637, 2643 (1993).

ARGUMENT

AMENDMENT 2 DOES NOT RATIONALLY ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST AND VIOLATES RESPONDENTS' RIGHT TO EQUAL PROTECTION OF THE LAWS

Amendment 2 carves out the group of gay men, lesbians, and bisexuals—and only that group—from any current or future law or government policy that provides for "minority status, quota preferences, protected status[,] or claim[s] of discrimination." If the amendment were allowed to stand, gay men, lesbians, and bisexuals would be unable to rely on such current provisions as the Governor's executive order and the laws in Denver, Boulder, and Aspen that bar sexual orientation discrimination, nor could they lobby their state or local legislators to adopt new laws or regulations that would prohibit such discrimination. Neither could they urge the enforcement of disciplinary standards, such as the Model Code of Judicial Conduct, that would prohibit bias against gay men, lesbians, and bisexuals in the workings of the legal system or in other regulated professions. In short, no government statutes, regulations, or policies that recognize gay men, lesbians, and bisexuals as members of a minority group, or provide them with "protected status" and legally cognizable claims of discrimination, could exist in the State of Colorado if Amendment 2 were given effect.

In contrast, laws or policies that prohibit discrimination on the basis of sexual orientation would not be affected by Amendment 2 to the extent that they confer protection on *heterosexuals*. Under the Amendment, gay men, lesbians, and bisexuals would be the *only group* in the State of Colorado that could not seek a remedy at law for unjustified adverse treatment.

Amendment 2 does not rationally advance any legitimate government interest and cannot survive scrutiny even under the most lenient level of equal protection review.

I. The Proper Application Of The Rational Basis Standard In This Case

A single rational basis standard governs all instances of lowest-level equal protection review. That standard requires that there be "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 113 S. Ct. at 2642. The test thus embodies two elements, each of which must be satisfied: "(1) Does the challenged [enactment] have a legitimate purpose? and (2) Was it reasonable for [those who adopted the measure] to believe that use of the challenged classification would promote that purpose?" *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981).

A. The Presence Of Illegitimate State Purposes Requires That Other Proffered State Interests Be Examined With Particular Care

The specific application of the rational basis test depends upon the factual circumstances of each case. Where the record reveals that one or more illegitimate state interests played a role in the challenged classification, the Court not only sets those interests aside, but also reviews any other proffered interests with particular care to ensure that impermissible state objectives were not, in fact, the sole basis for the classification. *See Cleburne v. Cleburne Living Center*, 473 U.S. at 448-450.

In such cases, moreover, the Court does not itself attempt to conceive of some legitimate, rational explanation for the classification that was never advanced by the government defendant, but instead considers only the additional government purposes actually put forward by the state. *See, e.g.*,

Cleburne, 473 U.S. at 449-50; *Zobel v. Williams*, 457 U.S. 55, 61-65 (1982); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534-38 (1973). To do otherwise would be to disregard the actual evidence of illegitimate government goals, thereby involving the judiciary in efforts to resuscitate classifications that fail the rational basis test.

Thus, in *Cleburne*, the Court began its rational basis analysis by highlighting the illegitimate government interests that the City of Cleburne relied upon in attempting to justify its differential zoning treatment of a group home for the mentally retarded:

> First, the Council was concerned with the negative attitudes of the majority of property owners . . . . But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

473 U.S. at 448 (citation omitted).[2] After pointing to such evidence of improper state goals, the Court closely examined

[2] *See also id.* at 449 ("[the Council] was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation."). *Compare Heller*, 113 S. Ct. 2637, in which the Court had before it no evidence of any animus against the mentally retarded. Even in upholding the statute based on such a record, the Court conducted an extensive analysis to determine whether the classification met the rational basis test.

other, apparently legitimate proffered interests—concern with the possibility of a flood, concern about legal liability, concern with overcrowding within the home, and concern with neighborhood congestion—and determined that the City's singling out of the home for the mentally retarded did not rationally serve any of those interests. *Cleburne*, 473 U.S. at 449-50. The Court stopped its analysis there, without attempting to generate some rational and legitimate explanation for the disparate treatment; instead, *Cleburne* held that the discriminatory zoning action violated the Equal Protection Clause because it "appears to us to rest on an irrational prejudice[.]" 473 U.S. at 450.

As the Court concluded, state purposes that embody such prejudice against a disfavored group cannot be countenanced. *Cleburne*, 473 U.S. at 448; *see also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985); *Moreno*, 413 U.S. at 534. It is, after all, only "*absent some reason to infer antipathy*" that the "Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted[.]" *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added), *quoted in FCC v. Beach Communications, Inc.*, 508 U.S. ___, 113 S. Ct. 2096, 2101 (1993).[3]

In contrast, the Court's decision in *FCC v. Beach Communications* demonstrates how the analysis properly proceeds when there is no indication that irrational prejudice or other illegitimate state purposes played a role in the enactment.

[3] *See also Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) ("The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification . . . . Habit, rather than analysis, makes it seem acceptable . . . . But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.' ").

Beach Communications challenged the FCC's distinction between cable television facilities that served buildings under common ownership or management and those facilities that served separately owned and managed properties. Nothing in the record led the Court to conclude that an illegitimate government goal may have led to that distinction. The Court, therefore, examined only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 113 S.Ct at 2101. Relying on a conceivable rational basis first suggested, not by the government, but by a member of the court of appeals, the Court upheld the differential treatment with little hesitation. 113 S.Ct. at 2103-04.[4]

B. Economic, Tax, And Social Welfare Benefit Classifications Are Given The Utmost Deference; Classifications Dealing With Civil Rights Receive A Closer Examination

The degree of plausibility needed for a court to find that a classification is a "rational" means of furthering a particular legitimate state purpose also depends upon the general subject matter that the classification addresses. The judiciary is most deferential to lawmakers in cases involving (a) regulatory classifications that deal only with "ordinary commercial transactions," *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938),[5] (b) line-drawing in the context of taxation,

[4] *Compare also Moreno*, 413 U.S. at 534-38 (detailed application of rationality requirement to other proffered government goals, where Congress apparently crafted food stamp restriction out of an illegitimate " 'purpose to discriminate against hippies' "), *with Lyng v. Castillo*, 477 U.S. 635 (1986) (cursory review of food stamp restriction in case not involving evidence of any illegitimate government interest).

[5] *See id.* at 152, 154 ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional" where it "is at least debatable"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) ("a statutory classification[,] . . . especially one dealing only with economic matters, need not be drawn so as to fit with precision the

Nordlinger v. Hahn, 505 U.S. ___, 112 S. Ct. 2326, 2332 (1992),[6] or (c) the differential "distribution of [monetary] benefits" under government social welfare programs, *Bowen v. Owens*, 476 U.S. 340, 345 (1986).[7]

It is in these subject matter areas where a "one step at a time" justification often has rendered a classification rational enough to satisfy equal protection requirements. *See, e.g., Lyng v. Castillo*, 477 U.S. at 643; *Williamson v. Lee Optical*, 348 U.S. at 488-89; *see also FCC v. Beach Communications*, 113 S. Ct. at 2102. Even while accepting an incremental approach, however, the Court has required at least some plausible rationale for the increment. *See id.*; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-66 (1981). Indeed, were it otherwise, arguing "one step at a time" would swallow the second prong of rational basis review altogether.

The Court's reluctance to second-guess the legislature in these areas reflects its recognition that economic, tax, and cash benefit programs depend on numerous, blunt classifications to operate in an efficient and viable manner. *See Califano v. Jobst*, 434 U.S. 47, 53 (1977) ("[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"). On the other hand, where, as in the present

legitimate purposes animating it"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955).

[6] *See id.* at 2336 (tax classification that is "not palpably arbitrary" is constitutional); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973).

[7] *See id.* at 345 (distribution of benefits under large social welfare scheme "requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential."); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

case, the Court is considering equal protection cases dealing with the availability of civil rights claims, the Court assesses the rationality or "fit" of the legislative classification with greater rigor. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982) (Blackmun, J., separate opinion) (finding classification of fair employment practices claims to have "so speculative and attenuated a connection to its [purported] goal" as to violate the rational basis test). "The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." 455 U.S. at 442.

II. Four State Purposes Behind Amendment 2 Are Illegitimate

The record in this case reveals at least four illegitimate government interests that have been offered as justifications for Amendment 2. In considering whether a classification can satisfy each of the rational basis standard's two prongs, illegitimate factors that emerge at any stage of the enactment's history are relevant to the Court's analysis.[8] An impermissible state interest not only fails the first prong of the test, but also colors the Court's analysis, under the second prong, of any other, apparently permissible proffered goals. Where, as here, illegitimate state purposes are proffered and then gradually

[8] *See Moreno*, 413 U.S. at 534-35 (discussing illegitimate government interest apparent from the legislative history, but abandoned in the litigation); *Cleburne*, 473 U.S. at 448-49 (discussing illegitimate factors considered during deliberations of City Council); *Zobel*, 457 U.S. at 61-63 (discussing illegitimate goal advanced by the state in litigation). *See generally Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (relying on history of state constitutional convention to discern an invidiously discriminatory purpose); *Reitman v. Mulkey*, 387 U.S. 369, 373, 378-79 (1967) (emphasizing, in equal protection challenge to popularly enacted state constitutional amendment, the propriety of examining "its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment' ").

abandoned as the government grasps for some satisfactory rationale, the shifting explanations underscore the need for closer judicial consideration.

A. Purposes Antithetical To The American Political System

1. Deterring Factional Debate On A Particular Political Issue Is Not A Valid State Objective

Throughout this litigation, Petitioners have argued that Amendment 2 serves not only a legitimate, but a compelling, state interest in deterring "factionalism." Pet. Brief at 47-48; Def. Colo. S. Ct. Brief at 44-49; Def. Tr. Brief at 59-61. Petitioners explain that the amendment arises out of "the necessity of ensuring that the deeply divisive issue of homosexuality does not serve to seriously fragment Colorado's body politic." Pet. Brief at 47; *see also* Def. Colo. S. Ct. Brief at 45 ("Amendment 2 is intended . . . to ensure that at some point the shouting in the room ceases, and a final decision is made on this divisive issue").[9]

This purportedly legitimate rationale was firmly and correctly rejected by the Colorado Supreme Court:

[9] That the goal of shutting down "divisive" political debate and activity on topics of interest to gay men and lesbians did, in fact, contribute to the passage of Amendment 2 was made clear at trial by Tony Marco, the founder of the Amendment 2 movement:

> [This measure] was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease. Secondly the legislature is very vulnerable to all kinds of lobbying and other activity without citizens' direct representation on that activity. Lobbying for which I discovered gay militants were very very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through the passage of [a] constitutional amendment. . . . [T]his seemed the logical way to accomplish that purpose.

Trans. at 839.

> Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. . . . We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)[.]

Pet. App. B-20 to -21. Indeed, as the trial court had stated, this "first claimed compelling state interest is *not* a compelling state interest. The *opposite* of defendants' first claimed compelling interest is most probably compelling." Pet. App. C-6 (emphasis in original).

Innumerable decisions of this Court underscore that the federal Constitution bars government from seeking to quell political controversy by silencing one faction. In *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989), for example, the Court emphasized that "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " A state cannot " 'attempt[ ] to pick and choose among the views it is willing to have discussed' " or " 'try[ ] to prescribe by law what matters of public interest people . . . may and may not discuss. This . . . [is] censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.' " *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Rather than having identified a valid government interest in ending political "fragmentation" on the issue of homosexuality in their state, Def. Tr. Brief at 60-61; Pet. Brief at 47-48, Petitioners have exposed the illegitimate censorial and discriminatory motives behind

Amendment 2. Government, through initiative lawmaking or otherwise, simply cannot aim to "resol[ve] . . . [a] debate," Def. Colo. S. Ct. Brief at 45, that continues to fragment society.

Petitioners at times have argued separately that Amendment 2 is justified by an interest in "achieving statewide uniformity on this divisive issue." Def. Tr. Brief at 55; Brief in Support of Mot. to Dismiss at 76. To the extent that the proffered interest is an argument for uniform civil rights laws, it is addressed below at Part III (A), but Petitioners sometimes use the "uniformity" rubric to describe a supposed state interest in promoting unified public opinion. *See* Def. Tr. Brief at 55; Brief in Support of Mot. to Dismiss at 76; Def. Colo. S. Ct. Brief at 45. Put that way, the purported interest in uniformity is simply another way of expressing the illegitimate purpose of ending political fragmentation: imposed uniformity on the topic of homosexuality is what will remain if factional debate is deterred and the "shouting in the room" ceases, Def. Colo. S. Ct. Brief at 45. The curbing of political debate remains just as constitutionally infirm when done to achieve "uniformity" on a particular issue as when done to deter controversy among different groups. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[10]

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[10] Of course, Amendment 2 does not mandate that citizens of Colorado hold a particular, uniform view of homosexuality, nor does it outlaw different factions that might form around "this divisive issue." In initially considering the legitimacy of an enactment's purposes, those goals are examined without regard to their rationality or chance of success. Here, Petitioners have explicitly offered, and the proponents of the initiative sought to achieve, plainly illegitimate state objectives. That fact is not altered by Amendment 2's implausible relation to those objectives.

(footnote continued)

2. The State, Without More, Has No Legitimate Interest In Barring Government Support For The Political Objectives Of A "Special Interest Group"

In each of the state courts, Petitioners argued that Amendment 2 serves the goal of preventing any government body from "supporting the political objectives of a special interest group." Def. Colo. S. Ct. Brief at 43; *see also* Def. Tr. Brief at 68.[11] The Colorado Supreme Court expressed astonishment that the state would claim such an interest: "Defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a 'special interest group.' . . . [V]irtually any law could be regarded as a benefit to a 'special interest group.' " Pet. App. B-20.

Indeed, a state cannot legitimately seek to handicap a "special interest group" in its lobbying and other advocacy efforts for the bare purpose of guaranteeing that group's failure in its appeals to the government. *See Moreno*, 413 U.S. at 534 ("if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest")(emphasis in original). Group-based political activity is specially valued and protected under the federal Constitution. As the Court explained in *Gilmore v. City of Montgomery*, 417 U.S. 556,

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(footnote continued from previous page)

Similarly, laws or policies prohibiting discrimination against gay men, lesbians, and bisexuals bar certain actions; they do not coerce opinion. Petitioners err in claiming that, without Amendment 2, they would be subjected to the "compelled endorsement of a particular viewpoint" in the purported form of nondiscrimination rules. Def. Colo. S. Ct. Brief at 44; Def. Tr. Brief at 69; *see also* Pet. Brief at 44.

[11] The history of Amendment 2 indicates that its proponents viewed gay men, lesbians, and bisexuals as dangerous because they "made up a very powerful special interest lobbying group." Trans. at 1041.

575 (1974), the fundamental "freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." In *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988), the Court reiterated:

> The ability and opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama ex rel. Patterson*, 357 US 449, 460 . . . (1958).

487 U.S. at 13.

Simply labelling a group as a "special interest" does not constitute a legitimate basis for excluding that group from any positive government response to its advocacy. If anything, the formation or identification of a "special interest group" broadens the range of First Amendment rights that shield its political activities.

B. Purposes That Sanctify Private Prejudice

1. The State Has A Strong Interest In Protecting The Well-Being Of Children; Such Interest, However, Is Not Legitimate Where Grounded In Myths And Unfounded Fears

Another previously articulated interest behind Amendment 2 that apparently has been abandoned by the state is the goal of "promot[ing] the physical and psychological well-being of our children." Def. Tr. Brief at 73. That the state has a legitimate interest in protecting children is beyond dispute; however, Amendment 2 in no way addresses that concern. Rather, proponents of the measure exploited the very real

problem of child abuse in order to play upon popular fears and myths about gay men.[12]

Before the trial court, Petitioners described Amendment 2 as serving this asserted state interest in the "well-being of our children" by "recogniz[ing] heterosexual marriage as the foundation of a stable family unit" or, alternatively, by "help[ing] to avert unnecessary suffering for those [young people] who may be influenced relative to their sexual preference by not lending government's voice to the debate." Def. Tr. Brief at 73, 75. Amendment 2, however, says nothing about marriage or families and, as even the state concedes, does "*not* lend[ ] government's voice to" any public discussion related to "unnecessary suffering." *Id.* at 75 (emphasis added). The trial court specifically found that "[i]f the . . . [proffered] interest is in protecting the psychological well-being of homosexual youth, the Court is unable to discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare." Pet. App. C-13 to -14.

In fact, the proponents of Amendment 2 played upon popular myths equating gay men with child molesters to fuel their campaign. Their campaign literature urged voters to say "no to sexual perversion with children—vote YES! on Amendment 2!" Pla. Tr. Exh. 22 at 2. Colorado for Family Values ("CFV") repeatedly and spuriously represented that "pedophilia (the sexual molestation of children) is actually an accepted part of the homosexual community!" and that:

[12] Even if a proffered state interest might under some circumstances be legitimate, it is rendered constitutionally impermissible if supported only by negative attitudes or fear. Here, the asserted state interest in the welfare of children is analogous to the asserted interest in protecting the mentally retarded from harassment in *Cleburne*: while protecting the mentally retarded may generally be a legitimate state concern, it is not legitimate when grounded only on "vague, undifferentiated fears" that junior high school students might harass retarded persons. 473 U.S. at 449.

> Though only 2% of the population, homosexuals commit between 1/3 and 1/2 of all recorded child molestations. Homosexual teachers commit as many as 4/5 of all pupil molestations. They are 12 times as likely as heterosexual teachers to molest children. "Gays" are 18 times more likely to incorporate children into their sexual practices as heterosexuals.

Pla. Tr. Exh. 22 at 2; Pla. Tr. Exh. 21 at 2.[13] The trial court soundly rejected these assertions:

> If the . . . [asserted state] interest relates to protecting children physically from pedophiles, the testimony of plaintiffs' witness Dr. Carole Jenny is more persuasive than anything presented by defendants. Dr. Jenny practices at Denver's Children's Hospital and made a study of persons who sexually abused children who were brought to that hospital. She indicated that pedophiles are predominantly heterosexuals, not homosexuals.

Pet. App. C-13.

Thus, if the purported state interest in protecting children has any relevance to this case, it is in exposing the fear- and prejudice-based appeals used by supporters of Amendment 2 to provoke a visceral, negative reaction. But "mere negative attitudes," " 'private biases' " and "vague, undifferentiated fears" cannot justify government's disparate treatment of different groups of citizens. *Cleburne*, 473 U.S. at 448, 449. To

[13] Plaintiffs' trial exhibit 22 is the main campaign tabloid urging approval of the initiative, of which 750,000 to 800,000 copies were circulated in Colorado prior to the Amendment 2 vote. Trans. at 735-36. (This compares with a printing of only approximately 204,000 copies of the state's ballot analysis. P.I. Trans. at 66.) Plaintiffs' trial exhibit 21 is a CFV brochure that emphasizes its claim that "One 'gay' pedophile organization's motto is 'Sex by 8 or it's too late.' " Pla. Tr. Exh. 21 at 2.

the extent that fearmongering with regard to pedophilia and other false notions about gay people led to the enactment of Amendment 2—and the history of that measure leaves no doubt that such biased views played a significant role—that basis for the classification is constitutionally illegitimate.

2. Serving "Prevailing Preferences" To Avoid Associations With Gay Men, Lesbians, And Bisexuals Is Not A Permissible Government Objective

Petitioners' brief attempts to justify Amendment 2 as follows: "eliminating anti-discrimination provisions that compel landowners and religious institutions to open their facilities to homosexuals and bisexuals is a rational means of *protecting* the legitimate *prevailing preferences* of the State's population." Pet. Brief at 13 (emphasis added). Similarly, the brief refers to the goal of "the preservation of traditional *social norms*." Pet. Brief at 47 (emphasis added); *see also id.* at 40. Those statements diverge from the state's proffered viewpoint-neutral interests in generally enhancing its citizens' constitutionally protected freedom of religion, freedom of association, and freedom within the family. *See infra* Part III (C) & (D). Here, Petitioners' claimed interest in furthering "prevailing preferences" and "social norms" is an impermissible government purpose because those phrases are merely other names for negative societal attitudes against gay men, lesbians, and bisexuals. *See also* Def. Colo. S. Ct. Brief at 39 (relying on the contention that "Coloradans as a whole have serious reservations regarding the homosexual lifestyle").

Although the majority may indeed dislike and not wish to associate with gay and bisexual citizens, such prevailing attitudes cannot be used to justify government action:

> [The state] may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes

> or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 US 429, 433 . . . (1984).

Cleburne, 473 U.S. at 448. Surely, under *Cleburne*, a zoning decision "fencing out" lesbians, gay men, and bisexuals would not be defensible as a means of protecting prevailing preferences. If that is so, then fencing them off from the protection of anti-discrimination laws cannot be defended on that basis, either.

Whether prevailing negative attitudes about a group arise from predominant religious beliefs, moral sentiment, tradition or mere habit, or simply an unthinking groundswell of antipathy, such attitudes against a disfavored class are an improper basis for adverse treatment by the state. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308, 309-13 (4th Cir. 1989) (government action ratifying citizens' religious and moral objections to fortune teller found illegitimate); *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (neighbors' unwillingness to accept adherents of "unfamiliar" religion ruled constitutionally impermissible basis for city's classification). Indeed, experience teaches that prejudice frequently is clothed in religious and moral terms. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (separation of the races said to be ordained by the Almighty); *Moreno*, 413 U.S. at 535 n.7 (adverse treatment of "hippies" originally defended on moral grounds).

III. The Additional Proffered Justifications Fail Rationally To Explain Amendment 2's Classification

Once illegitimate purposes are set aside, none of Petitioners' other claimed state interests provides rational support for the discriminatory classification created by Amendment 2. The challenged scheme cannot find any "footing in the realities of the subject addressed." *Heller v. Doe*, 113 S. Ct. at

2643. Amendment 2 does not represent a "rough accommodation" or "imperfect fit," Pet. Brief at 40 n.27, that nevertheless rationally furthers a valid state purpose. Instead, even after considering Petitioners' many attempts to explain this enactment, one is left with no " 'plausible [and permissible] reasons' " for it. *FCC v. Beach Communications*, 113 S. Ct. at 2101.

A. Concerns About Minimal Government Or Efficient Legal Rules Do Not Justify Amendment 2's Line-Drawing

Under the general rubric of "enhanc[ing] individual freedoms," Petitioners contend that Amendment 2 promotes the state's interest in minimal government in accordance with "the time-honored view that '[t]hat government is best which governs least,' " Pet. Brief at 43, 46. Whatever the philosophical merits of this maxim may be, it fails completely as a rationale for the classification drawn by Amendment 2. It does not explain how the cause of limited government is furthered by eliminating anti-discrimination protections for lesbians, gay men, and bisexuals while retaining such protections for heterosexuals and every other covered group.

Moreover, a state interest in limited government could be invoked in support of *any* government decision to include one class, but exclude another, from legislation, since, in a sense, excluding part of the citizenry would always foster "less government." To permit such a result would effectively end meaningful rational basis review. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. at 882 n.10 ("[i]ndeed, under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified") (emphasis in original).

The state also argues that Amendment 2 provides "uniform civil rights laws," thereby promoting "efficient enforcement" and "an environment where large employers and property owners may operate" with greater predictability. Pet. Brief at

47. Yet Amendment 2 actually diminishes uniformity by permitting some to seek redress through the legislature, while prohibiting others from doing so. The amendment eliminates anti-discrimination protections for gay, lesbian, and bisexual individuals, but leaves in place a patchwork of state and local protections for other classes. Indeed, some, but not all, jurisdictions will continue to prohibit sexual orientation discrimination, albeit solely against heterosexuals.

Furthermore, the mere invocation of a desire for uniformity, without more, can never serve to rationalize a state's irrational decision to be "uniform" on a selective basis. Otherwise, the equal protection requirement that government line-drawing have some rational basis would, as a practical matter, cease to exist. As the Court stated in *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (citation omitted), "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory [and thus uniform] application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *See also James v. Strange*, 407 U.S. 128, 140-41 (1972).

B. The Goal Of Reserving Discrimination Remedies For "Suspect And Other Needy Classes" Does Not Rationally Explain This Scheme

Petitioners also attempt to justify Amendment 2 by citing the state's interest in reserving its "limited resources" for "those who are particularly deserving of special protection," namely, "suspect and other needy classes." Pet. Brief at 13, 42. Once again, however, Petitioner's claimed rationale does not relate to the classification that Amendment 2 employs.

Amendment 2 leaves intact anti-discrimination protections for many other groups. Aspen's ordinance, for example, prohibits discrimination based on marital status, affectional orientation, family responsibility, and political affiliation. *See* Aspen Mun. Code § 13-98. Denver's law covers discrimination on the basis of military status. *See* Denver Rev. Mun.

Code, ch. 28, art. IV, § 28-91(b). Moreover, as noted above, Amendment 2 does not disturb existing (or future) protections for heterosexuals. None of the groups covered by those provisions is constitutionally "suspect." Petitioners fail to offer any rationale for thinking that categories such as marital status, military status, family responsibility, or heterosexuality plausibly describe groups more "needy" than lesbians, gay men, and bisexuals. In sum, Petitioners cannot explain how the state's limited resources will be conserved by an amendment that defines the "needy" to include *any and every conceivable group except* lesbians, gay men, and bisexuals.

C. First Amendment Freedoms Do Not Provide A Rational Basis For This Classification

Petitioners next attempt to find a rational basis for Amendment 2 in the state and federal constitutional rights to freedom of religion and intimate association. They argue that anti-discrimination laws interfere with private decisions not to employ or rent to others on religious grounds and with personal choices in forming intimate relationships. *See* Pet. Brief at 43-45.[14] Again, however, Petitioners' stated reasoning does not explain the classification used by Amendment 2.

Just as some individuals might wish to avoid associating with gay people, others might wish to refrain from employing,

[14] In the course of setting forth this supposed state interest, Petitioners erroneously claim that anti-discrimination laws would force individuals with religious or other beliefs that judge homosexuality negatively to "compromise those convictions." Pet. Brief at 44. Indeed, throughout this litigation, Petitioners have contended that anti-discrimination protections would force its citizens to "accept . . . a particular ideology" about homosexuality. Def. Tr. Brief at 69; *see also* Def. Colo. S. Ct. Brief at 43-44. However, many decisions of this Court explain that a non-discriminatory policy for access or hiring does not in any way interfere with the maintenance of personal beliefs or the ability to air those beliefs. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). Laws prohibiting discrimination regulate actions, not thought.

renting to, or serving people who practice a different religious faith, or who are part of an unmarried or interracial couple. Like the city in *Cleburne*, Petitioners have not articulated any explanation for singling out lesbians, gay men, and bisexuals, when the proffered government interest would implicate many other groups as well.[15] Here, as in *Cleburne*, the challenged classification is not merely imprecise or underinclusive; it is irrational.

Indeed, far from increasing religious and associational freedoms in general, Amendment 2 privileges solely those religious views and associational decisions that reflect private bias against lesbians, gay men, and bisexuals. The Constitution, however, " 'places no value on discrimination,' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.' " *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973)); *see also Hishon v. King & Spalding*, 467 U.S. at 78 (same).

D. Amendment 2 In No Way Relates To Parents' Ability To Teach Their Children Moral Values

Finally, Petitioners contend that the "implicit endorsement of homosexuality fostered by laws granting special protections could undermine the efforts of some parents to teach traditional moral values" and that Amendment 2, therefore, seeks to protect freedom within the family. Pet. Brief at 45-46. However, neither Amendment 2 nor the laws it prohibits

[15] *See, e.g., Cleburne*, 473 U.S. at 449, 450 ("concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit"; " 'the City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot' ").

affect the freedom of parents, whatever their values, to teach and raise their children as they see fit.

As the Colorado Supreme Court held, anti-discrimination laws do not constitute a governmental endorsement of particular value choices:

> [A]ntidiscrimination laws make no assumptions about the morality of protected classes—they simply recognize that certain characteristics, be they moral or immoral—have no relevance in enumerated commercial contexts.
>
> . . .
>
> [P]rohibitions on discrimination against gay men, lesbians, and bisexuals do not imply an endorsement of any particular sexual orientation and practices.

Pet. App. B-15; *see also supra* note 14.

Moreover, even the proponents of the amendment testified at trial that Amendment 2 makes no moral statement. Trans. at 726 (testimony of Wilford Perkins, chairman of the board of CFV, that Amendment 2 "doesn't say anything about immorality or morality or criminalization or anything like that"); *see also* Trans. at 868. In Petitioners' own words, "Amendment 2 expresses no moral judgment on homosexuality, but rather is a plain injunction against certain types of governmental action." Def. Colo. S. Ct. Brief at 43 n.65.

CONCLUSION

For all the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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No. 94-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF AMICI CURIAE STATES OF OREGON, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, WASHINGTON, AND THE DISTRICT OF COLUMBIA SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state constitutional provision that prohibits state government from enacting or enforcing any law or policy that would protect gays, lesbians, and bisexuals from any form of public or private discrimination based on their sexual orientation.

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Introduction 5

II. Amendment 2 Is Invalid Because it Lacks a Legitimate State Objective. 8

A. Amendment 2 Is Not Entitled to Any Special Deference. 8

B. Amendment 2 Disables Colorado's Government from Addressing Discrimination Against One Group of Citizens. 9

C. The Substantive Policy Choice Contained in Amendment 2 Is Illegitimate. 11

III. Amendment 2 Unconstitutionally Denies a Class of Citizens Equal Access to Governmental Protection from Discrimination. 16

A. Amendment 2 Violates Equal Protection Principles of Neutrality. 17

B. Petitioners' Concerns About the Reach of a Decision Invalidating Amendment 2 Are Misplaced. 22

IV. No Rational Justification for Amendment 2 Can Be or Has Been Advanced. 27

CONCLUSION 30

APPENDIX . . . . . App-A

TABLE OF AUTHORITIES

CASES

Page

Carrington v. Rash, 380 U.S. 89 (1965) 25
Cipriano v. City of Houma, 395 U.S. 701 (1969) 25
City of Mobile v. Bolden, 446 U.S. 55 (1980) . . . 17, 18, 22
Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 11, 14-16, 29
Crawford v. Los Angeles Board of Education,
458 U.S. 527 (1982) 20
de'Sha v. Reed, 194 Colo. 367, 572 P.2d 821 (1977) . . . 14
Energy Reserves Group v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 21
Evans v. Romer, 854 P.2d 1270 (Colo. 1993) 24
Evans v. Romer, 882 P.2d 1335 (Colo. 1994) 9
Gordon v. Lance, 403 U.S. 1 (1971) 9, 14, 22, 23
Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 25
Heller v. Doe, 113 S.Ct. 2637 (1993). 27
Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) 8
Hunter v. Erickson, 393 U.S. 385 (1969) 8, 9, 13, 22
23, 26
James v. Valtierra, 402 U.S. 137 (1971) . . . 14, 22, 23, 25
Jones v. Helms, 452 U.S. 412 (1981) 20, 21
Kramer v. Union Free School Dist., 395 U.S. 621 (1969) 25
Lucas v. Colorado General Assembly,
377 U.S. 713 (1964) 8
Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 8
Mabon v. Keisling, 317 Or. 406, 856 P.2d 1023 (1993) . 10
McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430 (1940) 8
Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 27

Page

New York City Transit Authority v. Beazer,
440 U.S. 568 (1979) 18, 25
Powell v. Texas, 392 U.S. 514 (1968) 26
Reitman v. Mulkey, 387 U.S. 369 (1967) 9, 13
Roberts v. U. S. Jaycees, 468 U.S. 609 (1984) 19
Robinson v. California, 370 U.S. 660 (1962) 26
Sailors v. Board of Education, 387 U.S. 105 (1967) 9
San Antonio Independent School Dist. v. Rodriguez,
411 U.S. 1 (1973) 22
U.S. Term Limits, Inc. v. Thornton, ___ U.S. ___,
63 USLW 4413 (1995) 8
United States Dept. of Agriculture v. Moreno,
413 U.S. 528 (1973) 14-16, 28, 29
United States v. Carolene Products Co.,
304 U.S. 144 (1938) 21
Washington v. Seattle School Dist. No. 1,
458 U.S. 457 (1982) 9, 14, 17, 18,
21, 22, 26
Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993) 20
Zobel v. Williams, 457 U.S. 55 (1982) 14, 29

CONSTITUTIONAL AUTHORITIES

Colo. Const. Art. II, § 10 12
Colo. Const. Art. II, § 11 12

STATUTES

D.C. Code Ann. § 1-2512(a) (1981) 2
D.C. Code Ann. § 1-2515(a) (1981) 2

TABLE OF AUTHORITIES—Continued

Page

Mass. Gen. L. ch. 151B, § 4 2
N.J. Rev. Stat. § 10:5-4 (1994) 2
Or. Rev. Stat. § 659.165 26

MISCELLANEOUS

John Hart Ely, DEMOCRACY AND DISTRUST (1980) 22
Schuman, *The Origin of State Constitutional Direct Democracy*, 67 TEMPLE L. REV. 947 (1994) 3
Supreme Court Rule 37.5 1

No. 94-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, et al.

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF AMICI CURIAE STATES OF OREGON, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, WASHINGTON, AND THE DISTRICT OF COLUMBIA SUPPORTING RESPONDENTS

INTEREST OF AMICI

The States of Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Washington and the District of Columbia submit this brief in support of respondents, pursuant to Supreme Court Rule 37.5. The issue in this case arises out of an amendment to the State of Colorado's constitution. That amendment explicitly disables the State from prohibiting any form of discrimination against a person because of his or her sexual orientation. In defense of this withdrawal of state protection, petitioners argue that a majority of voters may always disable a State from protecting any disfavored group from discrimina-

tion so long as the group is not a suspect class. To hold otherwise, petitioners contend, would be an unjustified interference with state sovereignty. The *amici* States' interest in this case arises, in large part, from the arguments petitioners make.

All the *amici* States and the District of Columbia have adopted antidiscrimination laws. None of their antidiscrimination laws is limited to suspect classes. Rather, most jurisdictions, as well as the federal government, have extended protection against discrimination to non-suspect groups, such as the aged, the mentally retarded, and the physically disabled. Some States and the District of Columbia have also protected their citizens from public (and sometimes private) discrimination on the basis of sexual orientation.[1] If, as petitioners argue, a majority may always disable government from protecting a disfavored group from discrimination so long as it does not target a suspect class, then the *amici* States' efforts to protect their aged, mentally retarded, and handicapped citizens (as well as their gay, lesbian, and bisexual citizens) from popular bias will be jeopardized.

Petitioners' arguments implicate a second state interest. In their defense of Colorado's amendment, petitioners and their supporters express deep concerns about the potential effect an adverse decision would have on the States' sovereign right to allocate authority among the various divisions of state government. The States joining in this brief value their sovereignty equally with Colorado and the States that have appeared in Colorado's support. We, too, would be troubled by a federal equal protection analysis that would require courts to scrutinize

[1]Some States have enacted statutes prohibiting discrimination on the basis of sexual orientation. *See, e.g.*, Mass. Gen. L. ch. 151B, § 4 (employment); D.C. Code Ann. §1-2512(a) (1981) (employment); D.C. Code Ann. § 1-2515(a) (1981) (real estate sales); N.J. Rev. Stat. § 10:5-4 (1994) (employment). Other States have adopted similar policies by executive order and by administrative rule. In Oregon, for example, more than 20 agencies ranging from the Construction Contractors Board to the Department of Veterans' Affairs include sexual orientation in their antidiscrimination policies.

the wisdom of every public policy contained in a State's constitution. And we would be concerned by any significant threat to the vitality of the tools of participatory democracy, such as the initiative and referendum.[2] But we do not believe this case presents that kind of threat. With due respect for Colorado and our sister States, in our view their concerns about the potential effect of an adverse decision are misplaced. The *amici* States have an interest in clarifying the record by putting another state perspective before the Court.

SUMMARY OF ARGUMENT

1. The threshold issue to be addressed in this case is whether the substantive policy contained in Amendment 2 is itself legitimate, and therefore one that a State is entitled to pursue. Under any level of scrutiny, even rational basis, state laws must always be aimed at legitimate objectives. Amendment 2 is not.

Amendment 2 in effect provides that no law may be enacted or enforced to protect gays, lesbians, and bisexuals from discrimination of any kind. By placing this prohibition in its constitutional charter, Colorado has categorically prohibited its government from protecting a group of its citizens from any form of discrimination. The discrimination may be public or private. It may be in housing, employment, and public accommodation; in the provision of governmental benefits and services; or in any other area or form open to the imagination of private citizens and public officials alike. No segment of life's activities is spared from the amendment's indiscriminate reach. Amendment 2 stands as nothing more refined than a

[2]Several of the *amici* States have long traditions of direct participation of the electorate through initiative, referendum, and recall. Oregon, for example, is generally credited with having been the State where initiative, referendum, and recall procedures were first seriously discussed and exercised. As a result, such provisions were known collectively for decades as "the Oregon system." *See generally* Schuman, *The Origin of State Constitutional Direct Democracy*, 67 TEMPLE L. REV. 947, 947–48 (1994).

blanket endorsement of discrimination for the sake of discrimination, one that elevates public and private discrimination against one group of citizens to the status of a constitutional right. Whatever lines might be drawn to differentiate among citizens on the basis of sexual orientation, the wholesale authorization of discrimination found in Amendment 2 is not a legitimate state goal, for this or for any other group. Amendment 2 fails the threshold test that any law must meet under the Equal Protection Clause, and for that reason alone is unconstitutional.

2. Petitioners defend Amendment 2 as merely withdrawing a policy choice from elected officials and placing it in the voters' hands. The amendment, however, is not that benign. In effect, Colorado has withdrawn equal access to governmental protection from discrimination based only on one group's common personal characteristics. For all other groups, suspect and non-suspect, when they need legislation or policies directed to the interests they share by virtue of their distinguishing personal characteristics (age, marital status, mental or physical disability), Colorado's government has the power to protect them. But when the shared personal characteristic is gay, lesbian, or bisexual orientation, Colorado's government is no longer the government to which they may turn.

The invidious effect of that restructuring of political decisionmaking should not be underestimated. The Equal Protection Clause is indifferent to a State's allocation of lawmaking power, so long as the terms of its political structure are neutral. But to withdraw governmental power by reference to the personal characteristics of a distinctive group, and to declare that no law may be enacted or enforced protecting that group from discrimination, is to declare in advance that persons, not issues, are to be the consistent losers in any contest over their group interests. The result is all the more pernicious given Amendment 2's broad focus on laws that would protect gays, lesbians, and bisexuals from discrimination of any kind.

Amendment 2 is the antithesis of the neutrality that the Equal Protection Clause requires. It can be sustained, if at all, only if it satisfies strict scrutiny or some other heightened level of review, which it does not.

3. Finally, even if Amendment 2 is subject only to a rational basis test, it is invalid. That test requires that the Court first ask what line is drawn by Amendment 2's terms, and then whether that line rationally serves legitimate state objectives. Properly, petitioners must advance rational reasons for Amendment 2's categorical authorization of discrimination against gays, lesbians, and bisexuals. None of petitioners' rationales is adequate to support the amendment's breadth. Moreover, all of their proffered rationales at most defend private discrimination, not the public discrimination that Amendment 2 also authorizes. The problem is not simply one of imprecision. Rather, the problem is that petitioners' rationales are far too narrow, and the sweep of Amendment 2 too broad, to provide the necessary confidence that Amendment 2 is supported by anything other than private bias and prejudice.

ARGUMENT

I. INTRODUCTION

Prior to the enactment of Colorado's "anti-gay rights" initiative to amend the State's Constitution (Amendment 2), the state legislature, the governor, some state agencies, and certain local governmental bodies had adopted various laws and policies designed to protect Colorado's citizens from discrimination on the basis of sexual orientation. Most of those policies and laws related to private and public discrimination in the areas of employment, housing, public accommodation, and higher education. The protections given to persons on the basis of sexual orientation were extensions of antidiscrimination policies previously adopted and in place for numerous other non-suspect classes of citizens, such as the aged, the mentally and physically disabled, and unmarried persons. The judgment

of many of Colorado's elected officials and representatives had been that gays, lesbians, and bisexuals were also singled out for private and public discriminatory treatment on the basis of personal characteristics having no real relationship to ability or need, and were equally in need of protection.

Amendment 2 was a "grassroots" response to those governmental policies and enactments. Using Colorado's initiative process, a coalition of private citizens ("Colorado for Family Values") succeeded in gathering the necessary signatures to qualify Amendment 2 for the 1992 general election ballot. By a small majority, the voters passed the provision. Colorado's Constitution effectively was amended to declare that no legislative body or public official may enact or enforce any law or policy that provides a basis for any claim of discrimination against gays, lesbians, and bisexuals.

Central to petitioners' defense of Amendment 2 is their view that this amendment amounts to nothing more than a routine exercise of the people's authority to express their disagreement and displeasure with the policies of their governmental officials, and to change those policies. As petitioners cast it, this is simply a case in which gays, lesbians, and bisexuals "lost an election"; their interests have not been harmed in any way that is of consequence to the Equal Protection Clause. (Pet. Br. 27). Gays, lesbians, and bisexuals, petitioners maintain, "continue to have precisely the same rights as *anyone else* who has lost an election. They may continue to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in those processes." (*Ibid.*) (emphasis in original).

Were this a case involving a mere repeal of a public policy with which a majority of private citizens disagree, the *amici* States would have no quarrel either with petitioners' arguments or with their defense of the actions of Colorado voters. The political process is designed for exactly those disagreements.

When legislatures enact unpopular laws, citizens may put political pressure on their governor to veto them. If the governor fails to do so, voters in some States may force a referral of the law for popular vote; in other States, voters may initiate repealing legislation. In all States, voters retain access to the power of the ballot box—that is, they may "vote the rascals out"—either using special recall procedures or declining to vote for incumbents when they stand for reelection. Through these and other mechanisms, political decisionmaking involves a dynamic process of checks and balances, with the will of popular majorities operating as a frequent check.

This is not, however, a case in which Colorado voters have merely checked the actions of their elected government officials. Here they have achieved a checkmate. Amendment 2 does more than repeal the previously adopted antidiscrimination policies and laws for sexual orientation. It operates to divest all branches of Colorado's government of any authority to act in the future, leaving gays, lesbians, and bisexuals with no protection other than whatever a popular majority can be implored to grant. And by doing so at a constitutional level, Amendment 2 expresses a substantive state policy that such discrimination is now officially authorized in Colorado.

From the *amici* States' perspective, this case is one that can and should be decided on a narrow ground. The Court need not decide whether gays, lesbians, and bisexuals are a suspect or quasi-suspect class, or whether sexual orientation can be a legitimate basis for some legislative distinctions. It is sufficient to hold that the wholesale withdrawal of a State's ability to protect one group of its citizens from discrimination, which Amendment 2 accomplishes, is not a legitimate state goal. That illegitimacy, even under a rational basis analysis, renders Amendment 2 unconstitutional.[3] This brief begins with that

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[3] Respondents raised the illegitimacy of Amendment 2 below in the course of analyzing it under a rational basis test. (*See* Def. Ans. Br. 17–18).

(continued...)

argument. It then explains why the Colorado Supreme Court's analysis, properly understood, provides an alternative ground for holding Amendment 2 unconstitutional.

II. AMENDMENT 2 IS INVALID BECAUSE IT LACKS A LEGITIMATE STATE OBJECTIVE.

A. Amendment 2 Is Not Entitled to Any Special Deference.

One of the core attributes of state sovereignty is a State's authority to structure its form of government in the way that it chooses. *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (a State may alter and change its form of government at the people's pleasure). It is therefore generally true that a State may distribute legislative power as it desires, and that the people of a State, through initiative and referendum, may retain for themselves power over certain subjects. *See, e.g., Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70 (1978); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *id.*, at 394 (Harlan, J. concurring). Considerations of sovereignty, however, provide no justification for a choice of political structure that otherwise violates the Fourteenth Amendment. *Hunter*, 393 U.S., at 392. Nor does the fact that particular changes are adopted through popular initiative or referendum provide any basis to give greater leeway to a State's chosen political form. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 726–37 (1964); *see also U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 63 USLW 4412, 4422 n. 19 (1995). Contrary to petitioners'

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[3](...continued)
Moreover, the issue is subsumed in petitioners' own rational basis argument, which asserts that Amendment 2 rationally serves legitimate state objectives. (Pet. Br. 13, 39–48). Thus, even though the Colorado Supreme Court decided the case on an alternative ground, the question of Amendment 2's legitimacy is properly before the Court. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

position,[4] the fact that Amendment 2 may implicate the structure of Colorado's government, or that it was passed by initiative and reflects popular majoritarian will, provides Colorado no special shelter from the requirements of the Equal Protection Clause. *See Gordon v. Lance*, 403 U.S. 1, 6 (1971) ("the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy"); *Sailors v. Board of Education*, 387 U.S. 105, 109 (1967) (vast leeway is due a State in the management of its internal affairs only save and unless it runs afoul of a federally protected right).

B. Amendment 2 Disables Colorado's Government from Addressing Discrimination Against One Group of Citizens.

The starting point for any equal protection analysis should be the terms of the amendment, together with its immediate objective, ultimate effect, and historical context. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967); *see Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 462–64 (1982) (examining validity of law in light of its effect and the campaign that led to its enactment); *Hunter*, 393 U.S., at 391 (same). The full text of Amendment 2 is set out in petitioners' brief. (Pet. Br. 2). Pared to its operative provisions, the amendment provides that neither state nor local government may enact or enforce any law or policy "whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . any claim of . . . protected status or claim of discrimination."[5]

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[4] Pet. Br. 14–16.

[5] Consistent with the posture of the case in the lower courts, we focus only on sexual orientation, not "conduct, practices, or relationships." The Colorado Supreme Court limited its holding to orientation, and did not reach the other prohibitions set out in Amendment 2. The Court invalidated the amendment as a whole because, as a matter of state law, the other prohibitions were not severable. *Evans v. Romer*, 882 P.2d 1335, 1349–50 (Colo. 1994). Similarly, we do not concern ourselves in this brief with the amendment's references to quota preferences, which may present a different

(continued...)

By virtue of its text alone, the object of Amendment 2 is clear. It is aimed at one group of citizens defined solely by a distinctive personal characteristic—sexual orientation. Its effect is equally clear. It explicitly disables state and local government from protecting gays, lesbians, and bisexuals from any act of discrimination they suffer because of their sexual orientation. Amendment 2 does not mince words. It expressly makes "discrimination" part of the Colorado Constitution. And it does so not by simply repealing an existing antidiscrimination provision, but by preventing government from taking any steps in the future to protect its citizens from any discrimination (public or private) based on their sexual orientation.

The history of Amendment 2's enactment confirms that it was intended to have precisely that effect. Prior to the passage of Amendment 2, several state and local governmental bodies in Colorado had recognized a need to protect gays, lesbians, and bisexuals from discriminatory actions directed against them because of their sexual orientation. State agencies in Colorado similarly had adopted policies to protect gays, lesbians, and bisexuals from discrimination in state employment and higher education. (*See* Pet. Cert. App. F). In voting on the amendment, the citizens of Colorado were apprised of the legislative and executive response nationwide to discrimination based on sexual orientation. Specifically, they were told that at least six States and the District of Columbia, 110 cities and counties in 25 States, eight governors, and 65 college and university systems had extended antidiscrimination legislation and policies to cover sexual orientation. (*Id.*, App. F-5, F-6).

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[5](...continued)
question and were not the focus of the campaign to enact the measure. *See* Pet. Cert. App. F (legislative council analysis of the measure); App. B (district court opinion). Nor do we concern ourselves with the concept of governmental grants of "minority status" which, despite its popularity in provisions of this kind, is legally incomprehensible. *See Mabon v. Keisling*, 317 Or. 406, 414, 856 P.2d 1023 (1993) (the concept of "granting minority status" to homosexuals or any other group has no recognized meaning).

The Colorado voters simultaneously were assured, however, that if Amendment 2 were enacted, current protective policies in Colorado would be nullified, and state and local governmental officials and entities in Colorado would have no power to adopt or enforce similar policies in the future. (*Id.*, App. F-1). As against what had been a growing responsiveness at state and local government levels to a perceived need to protect gays, lesbians, and bisexuals from discrimination in at least certain areas of private and public life, Amendment 2 offered Colorado's voters a promise that in their State, the same responsiveness would be preemptively foreclosed.

What emerges both from Amendment 2's text and the background against which it was enacted is a design to close off the ordinary channels of government to a disfavored group of citizens, so that they could not seek protection from discrimination in any area that government had in the past or would in the future consider.

C. The Substantive Policy Choice Contained in Amendment 2 Is Illegitimate.

The Court has long recognized that even under a rational basis test, government must seek to advance a legitimate state interest. *E.g.*, *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (asking whether the "classification drawn by the statute is rationally related to a legitimate state interest"). Said another way, even if a law rationally or perfectly furthers an objective, it is invalid if the objective is one that government simply is not entitled to advance.

The terms of Amendment 2 demonstrate that it fails that threshold inquiry. The amendment effectively declares, in so many words, that no law shall be passed protecting gays, lesbians, and bisexuals from discrimination of any kind. Its goal is not to alter Colorado's political structure, but rather to announce substantive state policy. Expressly using the word "discrimination," it proclaims as a matter of state constitutional

law that both private citizens and public officials are free to discriminate on the basis of sexual orientation, and no governmental body or official may change that. Its very text communicates an unmistakable message to Colorado's citizens: After Amendment 2, gays, lesbians, and bisexuals constitutionally may be treated on unequal terms for any reason, or no reason, or for a bad reason.

Petitioners defend Amendment 2 as a mere "restructuring" of the political decisionmaking process in Colorado, by which the issue of discrimination based on sexual orientation has been withdrawn from public officials and committed instead to the will of the popular majority. (*E.g.*, Pet. Br. 11, 27). One could say the same, however, of Colorado's constitutional provisions protecting free speech or guarding against ex post facto and other laws. Article II, section 10 of Colorado's Constitution provides: "No law shall be passed impairing the freedom of speech . . . ." Article II, section 11 states: "No ex post facto law . . . shall be passed by the general assembly." Those, too, could be described as mere choices about which decisions are committed to the ordinary channels of government, and which are reserved to the people themselves. But that description would be sorely incomplete.

The familiar terms on which constitutional free speech, equal privileges, and similar provisions are commonly crafted are not, in any direct sense, choices of how to structure political decisionmaking; they are substantive guarantees, first and foremost. Put simply, constitutional prohibitions on lawmaking (and law enforcement) power are themselves a source of constitutional rights. When a state constitution, like the federal, declares that "no law shall be passed impairing the freedom of speech," that declaration stands as an affirmative acknowledgement of the cherished place expression has among our constitutional freedoms—so cherished that government cannot infringe it.

Amendment 2 is no different, either in its terms or effect. As an amendment to Colorado's Constitution, it elevates discrimination based on sexual orientation to the status of a positive constitutional right, on a par with free expression and the other liberties secured by Colorado's Bill of Rights. Just as a prohibition on laws directed at expression confers a correlative personal right to speak freely, so too does Amendment 2 confer a correlative personal right to discriminate freely. As was true in *Reitman*:

> The right to discriminate . . . [is] now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing . . . discrimination need no longer rely solely on their personal choice. They [may] now invoke express constitutional authority, free from censure or interference of any kind from official sources.

387 U.S., at 377 (describing the effect of elevating a policy of non-interference with private racial discrimination to a constitutional level).

The use of the word "discrimination," in and of itself, raises serious doubts about the legitimacy of Amendment 2's goals. When used without qualification or limitation, the substantive policy endorsed by Amendment 2 is unlike anything to come before the Court. Until now, similar cases have all involved challenges to political burdens or barriers erected in narrowly defined areas of particular voter concern—*e.g.*, sales and rentals of private housing, school busing, construction of low-income housing, group homes for the mentally retarded, and so on.[6] Amendment 2, in contrast, is a blanket endorsement

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[6] In *Reitman*, the challenged constitutional amendment was directed narrowly at private discrimination in housing. Somewhat more narrowly, in *Hunter*, the city charter amendment at issue required a referendum on ordinances specifically concerning racial, religious, or ancestral discrimina-

(continued...)

of discrimination. By its terms, it is not limited to discrimination in private housing or publicly available goods and services. Nor is it limited to discrimination in the provision of governmental food stamps or assistance progr s, or even discrimination against public employees in jobs, salaries, or other conditions of their government employment. To be sure, all of those are encompassed within Amendment 2's sweep. But so is public and private discrimination of virtually every other imaginable kind.[7] Where prior cases have involved legislation aimed at particular policy choices with a certain degree of strategic precision, Amendment 2 indiscriminately lays waste to an entire landscape. It authorizes public and private discrimination against gays, lesbians, and bisexuals in every segment of their lives. Nothing like Amendment 2 has been enacted into constitutional law by any governmental or populist body anywhere in this country, at least not since reconstruction and the passage of the Fourteenth Amendment established as an attribute of citizenship that no State may deny "any person" the equal protection of its laws.

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[6](...continued)
tion in housing. Likewise, *Seattle School District* concerned only a restriction on local school board authority to use busing to promote integration. *See also Cleburne*, *supra* (special zoning permit required for operation of group homes for the mentally retarded); *Zobel v. Williams*, 457 U.S. 55 (1982) (distribution of government funds to residents based on length of residency); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (unrelated household members denied participation in food stamp program); *Gordon v. Lance*, *supra* (referenda required to incur bonded indebtedness or increase taxes); *James v. Valtierra*, 402 U.S. 137 (1971) (local referenda necessary to approve low income housing).

[7]Amendment 2 without question nullifies any antidiscrimination statutes and policies, present and future, adopted in Colorado by state and local government. Moreover, as the more specific provision and the one enacted later in time, Amendment 2 would presumably override any generalized equal protection guarantee contained in Colorado's constitution. *See de'Sha v. Reed*, 194 Colo. 367, 370, 572 P.2d 821, 823 (1977) (specific constitutional provisions govern over general ones and later enacted provisions impliedly repeal earlier enactments to the extent of a conflict). Petitioners have never contended otherwise.

Amendment 2, given its sweeping terms, stands as a novel endorsement of wholesale discrimination against a single group. It manifests a judgment that gay, lesbian, or bisexual status is a distinction that makes a difference for any purpose, and for all. In Colorado, gays, lesbians, and bisexual citizens are less equal simply because they have been categorically deemed less worthy of equality. Amendment 2 reflects no policy choice more subtle or refined than a policy of discrimination for discrimination's sake. It reduces to a provision that can be defended on no ground other than "a bare majoritarian desire to harm a politically unpopular group." *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Cleburne*, 473 U.S., at 447. As the Court consistently has recognized, however, governmental endorsement of discrimination against any group, suspect or non-suspect, on the basis of mere negative attitudes and fears is never legitimate. *Ibid.* Discrimination for the sake of discrimination is just as illegitimate when directed at the mentally retarded (*Cleburne*), or even at hippies (*Moreno*), as it is when directed at persons based on race. It is equally illegitimate here, regardless of how this class of citizens is described in terms of its "suspectness," or what level of scrutiny applies.[8]

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[8]It is because of Amendment 2's breadth that the Court need not decide whether sexual orientation can be a legitimate basis for some legislative distinctions. The answer likely will be, as it is even for suspect and quasi-suspect groups, sometimes yes, and sometimes no.

> That a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very different on a bathroom door than a courthouse door.

Cleburne, 473 U.S., at 468–69 (Marshall, J. dissenting). The Court properly should leave for another day the question under what specific circumstances sexual orientation may provide a "sensible ground for different treatment" or instead bears "no relation to the individual's ability to participate in and contribute to society." *Id.*, at 440–41 (majority opinion). No specific policy choice is before the Court.

Ultimately, the question that should be asked in this case is not simply whether a State may enact a blanket policy of the kind contained in Amendment 2 insofar as it is directed to gays, lesbians, and bisexuals. The issue should be whether a State may, consistent with the Fourteenth Amendment, authorize such discrimination against any class of its citizens. If petitioners are correct, a State could amend its constitution to declare: "No law shall be passed protecting unmarried persons, the deaf, or the mentally retarded from discrimination." A similar provision could be directed to any number of other non-suspect classifications, such as age, infirmity, intelligence quotient, pregnancy, length of residency, genetic makeup, and so on.

We would be surprised if any jurisdiction would be willing to defend a wholesale policy of discrimination directed to any other non-suspect group defined exclusively by common personal characteristics. The difference, if there is one, can only be that on some unspoken level, petitioners and their *amici* are willing to accept the legitimacy of a popular majority's discomfort, prejudice, or fear where the terms are "gay, lesbian, or bisexual," but would not do so were the terms "single but pregnant" or "mentally retarded." From the vantage point of the Equal Protection Clause, however, there is no difference. A policy choice that reduces to a bare dislike for, disapproval of, or willingness to harm any group is constitutionally indefensible, even for a non-suspect class. *Moreno*, 413 U.S., at 534; *Cleburne*, 473 U.S., at 447. The Court need go no farther than these settled precedents to resolve this case.

III. AMENDMENT 2 UNCONSTITUTIONALLY DENIES A CLASS OF CITIZENS EQUAL ACCESS TO GOVERNMENTAL PROTECTION FROM DISCRIMINATION.

In the *amici* States' view, Amendment 2's primary effect is substantive, and it should be analyzed from that perspective. That is, the threshold question should be whether the policy

expressed in the amendment is a legitimate one. Petitioners, however, approach the problem differently. They defend Amendment 2 as a legitimate restructuring of state government. Viewed from that perspective, the question should be whether a State may structure its government so that all of its branches are powerless to provide any form of protection from discrimination to a class of citizens defined solely by a personal characteristic. None of the Court's cases has considered this precise question, although the principles underlying them demonstrate that the clear answer is "no."

The fact that Amendment 2 classifies citizens on the basis of personal characteristics brings this case within the Court's precedents, even if the characteristics are not deemed suspect ones. The further fact that Amendment 2 deprives gays, lesbians, and bisexuals of equal access to protection from all forms of discrimination sets the provision apart as a far more encompassing restriction on political participation interests than anything the Court has previously considered. Those aspects of Amendment 2, combined, implicate equal protection values in a particularly fundamental way. Moreover, they distinguish Amendment 2 from the numerous other public policies contained in States' constitutions that petitioners fear will be threatened if Amendment 2 is held invalid.

A. Amendment 2 Violates Equal Protection Principles of Neutrality.

The Court has observed that its equal protection cases "yield a simple but central principle": Laws that structure political institutions or allocate political power according to "neutral principles"—such as executive veto provisions, or supermajority requirements for constitutional amendments—are not subject to equal protection attack, even when those neutral terms pose greater barriers for minorities to achieve their policy goals. *Seattle School Dist.*, 458 U.S., at 469–70 (following Justice Harlan's concurrence in *Hunter*); *see also City of Mobile*

v. Bolden, 446 U.S. 55 (1980) (city's method of electing representatives "at large" was constitutional even though the participation of racial minorities was diluted). The Court has reasoned that because a neutral political structure imposes an equal burden on every group in the community to secure the benefits of governmental action, it provides a "just framework within which the diverse political groups in our society may fairly compete." *Seattle School Dist.*, 458 U.S., at 470.[9]

Neither petitioners nor their *amici* make any attempt to defend Amendment 2 as a neutral restructuring of political decisionmaking, nor could they. Amendment 2 is explicitly class-based. It carves out a separate decisionmaking process (majoritarian will) for one group of people based solely on their personal characteristics, whereas all other groups may use the ordinary channels of government. Moreover, Amendment 2 focuses directly on "discrimination." It alters the political process to require this one group of citizens to change their constitution as a predicate to seeking any legislation that would protect them from the "special condition" of prejudice. *See Seattle School Dist.*, 458 U.S., at 486.

No one should underestimate Amendment 2's practical and legal significance. No branch of Colorado's government can do anything to remedy any form of public or private discrimination

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[9] The principle of impartial governance, of course, is not limited to questions involving governmental form; it extends equally to the laws and regulations that governments adopt. And impartial governance is a value to be served even where non-suspect classes are concerned. For example, in a case involving employment policies for methadone users, the Court stated:

> The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially. General rules that apply even-handedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

New York City Transit Authority v. Beazer, 440 U.S. 568, 588 (1979).

against gays, lesbians, and bisexuals in any area of those citizens' lives. Thus, even though States have a "compelling" interest in public accommodation laws addressed to non-suspect as well as suspect groups,[10] Colorado's government cannot serve that compelling interest where gays, lesbians, and bisexuals are concerned. Nor can Colorado's government either prevent or remedy discrimination by the government itself, as in the distribution of state benefits and services, or the hiring, firing, and conditions of employment for public employees. And Colorado's government cannot respond where its otherwise neutral laws are administered on an unequal basis for gays, lesbians, and bisexuals.[11] As troubling, in Colorado, the government cannot fully serve the most basic of governmental goals, such as maintaining public order. For example, Colorado cannot impose correspondingly greater penalties for violent crimes motivated by bias (so-called "hate crimes") where the bias is directed at gay, lesbian, or bisexual status. That is true even though the States uniformly have found that bias crimes result in particularly great individual and societal harm because they "provoke retaliation crimes, inflict distinct emotional

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[10] *See Roberts v. U. S. Jaycees*, 468 U.S. 609, 626 (1984). The Court observed in *Roberts* that public accommodation laws reflect "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Ibid.*

[11] Historically, one of the most insidious ways in which public officials sometimes discriminate against disfavored individuals or groups is to decline to administer otherwise neutral laws in a fair and evenhanded way. Among the most potent antidotes for such discrimination is to address the problem directly, with legislation that specially defines the obligation to administer the law equally for the benefit of some disfavored group, and that gives rise to liability if that obligation is not met. Laws falling into this category have been directed at suspect and non-suspect groups alike. *See, e.g.*, 42 U.S.C. § 1973 (Voting Rights Act of 1973) and 20 U.S.C. §§ 602 *et seq.* (Education for the Handicapped Act), both of which have counterparts in some States. Colorado's government cannot take such steps. It cannot respond effectively if, for example, one or more local Colorado police departments routinely refused to investigate or charge assault crimes when the victims of those assaults are gay, lesbian, or bisexual citizens.

harms on their victims, and incite community unrest." *See Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2201 (1993).

These consequences strike in a fundamental way at equal protection values. No State should be able to divest its government of all authority to address problems of discrimination for a single class of its citizens. Assuming such a disenfranchisement is not in and of itself illegitimate, it should at least be subject to heightened scrutiny. It is one thing simply to repeal existing antidiscrimination legislation. *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 538-39 (1982).[12] It is an altogether different matter to conclude that the legislative, executive, and judicial branches of government may be deprived of all power to respond to any form of discrimination, public or private, for a particular citizen group. Such a choice runs headlong into the Equal Protection Clause's core protection against subjecting "'one caste of persons to a code not applicable to another.'" *Jones v. Helms*, 452 U.S. 412, 424 (1981) (quoting Cong. Globe, 39th Cong., 1st. Sess., 2766 (1866)).[13]

[12] In *Crawford*, California amended the "equal protection" clause of its state constitution to provide that state courts could not require busing to remedy school segregation except to the extent the Fourteenth Amendment required it. 458 U.S., at 532. In holding the amendment constitutional, the Court was careful to note that the amendment did not prevent the state legislature from enacting (or state courts from enforcing) broader anti-discrimination laws than the Fourteenth Amendment required. *Id.*, at 536 n. 12. It merely repealed the state constitution's "equal protection" clause to the extent it imposed a greater obligation than the federal constitution. *Id.*, at 538-39 (distinguishing *Hunter* and *Reitman*). Unlike Amendment 2, the amendment at issue in *Crawford* did not disable state government from addressing the problem of discrimination.

[13] As the Court observed in *Jones*, an effective expression of this point was made in the Senate debate that preceded the adoption of the Fourteenth Amendment:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it

(continued...)

All citizens have a fundamental interest in being governed by a government empowered to protect them from class-based discrimination. That protection is the essence of what the Clause guarantees when it declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The net effect of any such class-based divestment of government's ordinary lawmaking and law enforcement power is to render the targeted class suspect, whether or not it was suspect before. Amendment 2 forecloses gays, lesbians, and bisexuals from seeking redress for discrimination through the ordinary channels of government. It negates the basis on which the Court ordinarily defers to the political judgments of the States, for it "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); *see also Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 417 n. 25 (1983) (where legislative processes function properly, courts should defer to legislature's findings). In Colorado, gays, lesbians, and bisexuals have been placed in the same position of general political powerlessness that has caused courts to intervene more actively to protect the rights of other similarly situated groups. *See Carolene Products*, 304 U.S., at 153; *accord Seattle School Dist.*, 458 U.S., at 486. The point is not that gays, lesbians, and bisexuals as a class are suspect or quasi-suspect for constitutional purposes. Rather, the point is that in Colorado, their state constitution relegates them to that status. The very disabilities that traditionally have given rise to heightened scrutiny have been constitutionally codified by Amendment 2. Heightened scrutiny is called for precisely

[13] (...continued)

> gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.

Id., at 424 n. 23 (quoting Senator Howard, Cong. Globe, 39th Cong., 1st. Sess., 2766 (1866)).

because of the political powerlessness that Amendment 2 itself achieves.[14]

B. Petitioners' Concerns About the Reach of a Decision Invalidating Amendment 2 Are Misplaced.

Petitioners are critical of the heightened review applied by the Colorado Supreme Court because they read its decision as announcing an unqualified right of "political participation" that runs to any number of groups that share a common goal. Petitioners fault the court initially for reading *Hunter* and its progeny too broadly. In their view, those cases should be limited to burdens placed on racial minorities (and perhaps other suspect classes). (Pet. Br. 19–24). Petitioners' argument fails to recognize that until this case, the Court has only had occasion to consider two types of "political structure" cases. At one end of the spectrum have been cases, such as *Hunter* and *Seattle School District*, that involved explicit racial classifications. At the other end have been cases such as *James v. Valtierra*, 402 U.S. 137 (1971), *Gordon*, and *City of Mobile*, all of which involved purely neutral terms for political decision-making and were not directed to explicit class distinctions of any kind, suspect or otherwise.[15] Until now, the Court has not

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[14]Suspect or quasi-suspect status historically has arisen out of the *de facto* unwillingness of government to respond to the needs of a minority group that is frequently the object of irrational distinctions based more on stereotypes and fear than on a realistic assessment of ability to participate in and contribute to society. *See generally* John Hart Ely, DEMOCRACY AND DISTRUST 153 (1980). In Colorado, for gays, lesbians, and bisexuals, the government's unresponsiveness to their interests is now *de jure*. Amendment 2 thus squarely implicates the judiciary's special role in safeguarding the interests of those groups "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

[15]In *Valtierra*, the majority and the dissent parted company on this point. The majority viewed the special referendum provisions for low-income (continued...)

considered any case precisely like this one. Although this case differs from *Hunter* in that it does not involve a racial classification, it is like *Hunter* (and different from *Valtierra* and *Gordon*) in that Amendment 2 does not operate on class-neutral terms. And Amendment 2 is more troubling than the law at issue in *Hunter* because it denies an entire class all protection from discrimination. Petitioners' easy distinction between this case and *Hunter* fails to recognize their more profound similarities.

Petitioners argue alternatively (and perhaps primarily) that extending *Hunter* beyond racial classifications will embroil federal courts in a ceaseless task of reviewing virtually every policy choice contained in a State's constitution. They view the state court's decision as an open-ended invitation to any disappointed constituency to invalidate state constitutional policy—constituencies that could range, they claim, from boy scout troops to tax protesters to victim's rights advocates; and include anti-abortionists and pro-abortionists, smokers and non-smokers alike, and persons on both sides of all similarly polarized issues. (Pet. Br. 35–38).

Petitioners' hypotheticals neither do credit to the Colorado Supreme Court's analysis, nor show allegiance to the principle of neutrality that has informed this Court's prior decisions. The Colorado Supreme Court did not resolve this case based on a vague and boundless right of "political participation." Rather, the court's holding was narrow. The right of political participation that the court recognized was a limited right to seek redress for discrimination directed to a group defined

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[15](...continued)
housing to be directed broadly at anyone advocating in favor of low income housing, *id.*, at 142, which of course could include those who might profit from that housing, as well as those who might live in it. The dissent would have analyzed the challenged provisions as directed specifically to poor persons as a class. *Id.*, at 145.

solely by a shared personal characteristic— sexual orientation.[16] That right is the essence of what the words of the Equal Protection Clause themselves guarantee. It is no answer, therefore, to argue that the voters in Colorado have merely exercised their authority to withdraw the issue of discrimination against gays, lesbians, and bisexuals from Colorado's government, and to entrust that issue to the will of the voters themselves. To be sure, in a democracy, all power ultimately flows from the consent of the governed. (*See* Pet. Br. 33–34). But the point of the Equal Protection Clause is that no person should have to seek that consent as a prerequisite to equal protection of the laws.

Nor did the Colorado Supreme Court use the term "independently identifiable group" to refer to any group that can be identified on the basis of common interests or shared political views, as petitioners assume. Rather, that term is best understood in the context in which it was used—that is, to refer to a group expressly singled out in the text of the amendment and defined solely by a personal trait, such as marital status, age, intelligence, or disability. *See Evans v. Romer*, 854 P.2d 1270, 1284–86 (Colo. 1993). So understood, the term is both much narrower than petitioners contend and consistent with the

[16] The state court repeatedly focused on the amendment's interference with political participation on issues of discrimination:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in government affairs *insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation*. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial *protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment*. Rather than attempting to withdraw anti-discrimination issues as a whole from state and local control, *Amendment 2 singles out one form of discrimination* and removes its redress from consideration by the normal political processes.

Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993) (emphasis added).

Court's precedents. The neutrality with which the Court has been concerned is a neutrality as to persons identified as such, not neutrality as to issues of general concern and broad impact, around which diverse and shifting coalitions of American people generally (and sometimes predictably) align. *See Valtierra*, 402 U.S., at 142. The latter is merely the daily stuff of politics. The former—an explicit classification based solely on personal traits—rarely if ever provides a satisfactory basis for allocating a State's lawmaking and law enforcement authority.[17] As the Court has observed, the Equal Protection Clause is particularly sensitive to classifications based on "some unpopular trait or affiliation" because of the special likelihood that such lines may "create or reflect [a] special likelihood of bias on the part of the ruling majority." *New York Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979).

Contrary to petitioners' claims, what is unprecedented in this case is not the result that the Colorado Supreme Court reached. It is the nature of the exercise of majoritarian power reflected in Amendment 2. In a single bold stroke, the amendment divests Colorado's government of any ability to protect one class (gays, lesbians, and bisexuals) from discrimination on the basis of their class characteristics. In doing so, it is unlike the myriad examples of constitutional policies that petitioners worry would be jeopardized if the Court invalidates Amendment 2. Few of petitioners' examples explicitly target classes at all, much less classes defined by a shared personal characteristic.

[17] The notion that courts should be suspicious of efforts to realign political decisionmaking along lines that focus on personal characteristics is intuitively correct. It is also consistent with the Court's voting rights cases, in which the Court has been concerned with denials or dilutions of political participation rights based not only on personal characteristics but also on extrinsic factors that ordinarily raise no equal protection concerns. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701 (1969) (revenue bond decisions to be made by "property taxpayers"); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (wealth); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (tax status); *Carrington v. Rash*, 380 U.S. 89 (1965) (military status).

The only group characteristic reflected in most of the examples is a common viewpoint on a political or social issue of general concern and broad impact (*e.g.*, abortion, law enforcement). As or more important, none of them posits a circumstance where the group, however defined, has been constitutionally declared unworthy of governmental protection from discrimination in any aspect of public or private life.[18]

In short, Amendment 2 is as offensive to Equal Protection Clause values as the provisions that were before this Court in *Hunter* and *Seattle School District*. Even if Amendment 2 is viewed as a structural provision only, it should be subject to heightened review because it allocates political power to deny a singular group of Colorado's citizens equal access to

[18] To illustrate the distinction, consider petitioners' suggestion that a constitutional amendment prohibiting local governments from enacting antismoking laws might be invalid on the theory that the amendment disenfranchises non-smokers from political participation, because they can no longer seek to change laws at local levels. Such an example is not apt. A more analogous case would arise if a state constitution were amended to declare that "no law shall be passed protecting citizens on the basis of their status as smokers from any form of discrimination." Contrary to the assumption that underlies petitioners' hypotheticals, laws directed narrowly to activities in which people engage (*e.g.*, smoking in a particular locale) do not present the same issue as laws directed broadly to personal characteristics or status. *Compare Robinson v. California*, 370 U.S. 660 (1962) (punishing a person's status as an addict violates Eighth Amendment), *with Powell v. Texas*, 392 U.S. 514 (1968) (act of public intoxication may be punished constitutionally).

For the same reason, statutes that merely ensure neutrality are not problematic. The amicus brief filed by Alabama in petitioners' support, for example, argues that an Oregon statute would be invalid under the Colorado Supreme Court decision. (Ala. Am. Br. 22). That statute, however, merely ensures neutrality by preempting local laws that would grant "special privileges" based on sexual orientation, while simultaneously barring local laws that would specially disadvantage that group. Or. Rev. Stat. § 659.165. Ordinances that prohibit discrimination may still be enacted. The statute is therefore the antithesis of Amendment 2. It does not endorse discrimination; it does not disadvantage any group based on personal characteristics; and it does not deprive any such group of the ability to seek governmental protection from discrimination.

governmental protection from all discrimination. To satisfy that review, petitioners would have to come forward with a particularly weighty governmental interest and they would have to demonstrate a close fit between their chosen means and desired ends. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (stating test for intermediate scrutiny). Petitioners properly do not argue that Amendment 2 can satisfy heightened review of any kind.

IV. NO RATIONAL JUSTIFICATION FOR AMENDMENT 2 CAN BE OR HAS BEEN ADVANCED.

Petitioners recognize that they must at least satisfy rational basis review to defend Amendment 2 successfully. In support of their argument that Amendment 2 is rational, petitioners urge that many rational justifications "undoubtedly could be established," but they offer the Court only three, and decline to press several they pursued in the state courts.[19] The rationales petitioners advance, however, are not adequate to sustain the amendment and its breadth, even under the more generous standards of rational basis review. *See Heller v. Doe*, 113 S.Ct. 2[illegible]42–43 (1993).

Rational basis review asks what line is drawn by a challenged law and whether that line bears some rational relationship to a legitimate governmental purpose. To make that inquiry, the focus first must be on what the law does. Then a court must inquire why it does it, and ask whether the law's terms are rational given the law's goals. For example, in

[19] Specifically, petitioners contend that Amendment 2, by reducing government oversight of private discrimination, saves limited governmental resources for suspect or other groups more deserving of protection from discrimination. (Pet. Br. 41–43). Petitioners submit, second, that Amendment 2 rationally protects private discrimination so that individual citizens—for associational, religious, familial and personal reasons—do not have to compromise their convictions. (Pet. Br. 43–47). Third, and last, petitioners defend Amendment 2 as a way to provide uniformity in laws statewide, thus giving "large employers and property owners" greater economic and legal predictability in their private affairs. (Pet. Br. 47–48).

Moreno, the challenged legislation denied food stamps to households occupied by unrelated cohabitants. The federal government defended the denial as a way to avoid fraud in the program. The question the Court properly asked was whether the line drawn by the statute (denying food stamps based on the relationship of the household inhabitants) was a rational one, not whether the goal of avoiding fraud was rational. 413 U.S., at 535–38.

Properly focused, the question here is not whether it is rational to have less government regulation, or to have more uniform statewide laws, or to seek to avoid interfering with the religious, moral or associational interests of private citizens. In the abstract, those objectives are of course "rational." The question is whether the line drawn by Amendment 2 (divesting government of authority to address private and public discrimination of any kind against gays, lesbians, and bisexuals) is a rational means to a legitimate end. Petitioners must defend the categorical policy choice to divest all governmental branches of the authority to respond to *any* problem of discrimination based on gay, lesbian, or bisexual status, because *that* is what Amendment 2 does. What must be rational here is the blanket "no protection from any form of discrimination" policy that Colorado voters enacted. Petitioners make no overture whatsoever towards a defense of that policy.

When the inquiry is correctly framed, the inadequacy of petitioners' proffered justifications is transparent. By way of analogy, using petitioners' approach, one could as readily defend a wholesale policy of discrimination against the mentally retarded. Given their particular intellectual and physical capacities, it may be rational to differentiate those individuals for certain purposes (*e.g.*, some kinds of employment). But that fact does not make it rational to differentiate them for all purposes (*e.g.*, special zoning for group homes for the mentally retarded only). Similarly here, the relevant question should be whether it is rational to adopt a categorical policy of discrimination on the basis of sexual orientation, not whether it is rational to distinguish on that basis in specific contexts. Amendment 2 authorizes the former, not the latter. It must be defended on its own terms or not at all.

Even apart from the misdirected focus of petitioners' rationales, the justifications they offer are logically and legally defective. All of those rationales relate to private discrimination, when the measure just as surely (and just as categorically) authorizes public discrimination against gays, lesbians, and bisexuals. A defense of the measure only by reference to select and carefully limited arguments in favor of private discrimination, given that governmental discrimination is equally authorized, provides at best half a rationale, where a whole one is needed. *See Zobel v. Williams*, 457 U.S. 55, 61–63 (1982) (rationale offered by the State to sustain length of residency classification could save only the prospective portion of the law, not the portion based on residency before the law's enactment).

The problem is not simply one of underinclusiveness, or of achieving mathematical nicety in the way the lines are drawn. Rather, at some point, the relationship between the defining personal characteristics and the stated goal becomes so attenuated as to render the focus on those characteristics irrational, arbitrary, or invidious. *See Cleburne*, 473 U.S., at 446 (citing with approval *Zobel*, 457 U.S., at 61–63; *Moreno*, 413 U.S., at 535). Said another way, when a law focuses on unpopular personal traits, there is a point at which the law's loose fit to its purported objectives provides no real confidence that it rests on anything other than prejudice or private bias. Amendment 2 far exceeds that point.

CONCLUSION

For the reasons stated above, the Colorado Supreme Court's judgment should be affirmed.

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APPENDIX A

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